

13
No. 88-411-CFX
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Title: Edward W. Murray, Director, Virginia Department of
Corrections, et al., Petitioners
v.
Joseph M. Giarratano, Johnny Watkins, Jr., and
Richard T. Boggs, et al.

Docketed:
August 31, 1988

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Harris, Robert Q.

Counsel for respondent: Sasser, Jonathan D.

Entry	Date	Note	Proceedings and Orders
1	Aug 31 1988	G	Petition for writ of certiorari filed.
5	Sep 26 1988	X	Brief amicus curiae of Florida filed.
2	Sep 30 1988		Brief amici curiae of Georgia, et al. filed.
3	Sep 30 1988		Brief of respondents Joseph M Giarratano, et al. in opposition filed.
4	Oct 5 1988		DISTRIBUTED. October 28, 1988
6	Oct 31 1988		Petition GRANTED. *****
7	Nov 16 1988		Record filed.
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8	Dec 15 1988		Joint appendix filed.
9	Dec 15 1988		Brief of petitioner Edward Murray, et al. filed.
10	Jan 12 1989	G	Motion of American Civil Liberties Union for leave to file a brief as amicus curiae filed.
11	Jan 12 1989	G	Motion of National Legal Aid & Defender Association, et al. for leave to file a brief as amici curiae filed.
12	Jan 13 1989		Brief amicus curiae of American Bar Assn. filed.
13	Jan 13 1989		Brief of respondent Joseph M Giarratano, et al. filed.
14	Jan 13 1989	G	Motion of Maryland State Bar Association, et al. for leave to file a brief as amici curiae filed.
15	Feb 3 1989		SET FOR ARGUMENT WEDNESDAY, MARCH 22, 1989. (3RD CASE)
16	Feb 8 1989		CIRCULATED.
17	Feb 11 1989	X	Reply brief of petitioners Edward Murray, et al. filed.
18	Feb 21 1989		Motion of American Civil Liberties Union for leave to file a brief as amicus curiae GRANTED.
19	Feb 21 1989		Motion of National Legal Aid & Defender Association, et al. for leave to file a brief as amici curiae GRANTED.
20	Feb 21 1989		Motion of Maryland State Bar Association, et al. for leave to file a brief as amici curiae GRANTED.
21	Mar 15 1989		Lodgings received. (40 copies).
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88-411

NO. _____

FILED

AUG 31 1988

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

EDWARD W. MURRAY, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS, et al.,
Petitioners,

v.

JOSEPH M. GIARRATANO, et al.,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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QUESTION PRESENTED

Does the right of "meaningful access to the courts" require states to provide a personal lawyer to represent an inmate who desires to attack a death sentence in state habeas corpus proceedings notwithstanding this Court's rulings that the United States Constitution does not provide a right to post-conviction counsel, that no preferred status for death row inmates in post-conviction matters is constitutionally required, and that states may meet their obligation of providing access to the courts in exactly the way Virginia has chosen?

LIST OF PARTIES

The parties to the proceedings below were the petitioners before this Court, Edward W. Murray, Director of the Virginia Department of Corrections, Gerald L. Baliles, Governor of the Commonwealth of Virginia, Robert N. Baldwin, Executive Secretary of the Supreme Court of Virginia, and Michael Samberg, Warden of the Virginia State Penitentiary, and the respondents, Joseph M. Giarratano, Johnny Watkins, Jr. and Richard T. Boggs, inmates confined in the Virginia Department of Corrections under sentence of death. Mr. Watkins and Mr. Boggs are named representatives of a class of death row inmates.

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APPLICABLE PROVISIONS OF LAW

CONSTITUTIONAL PROVISIONS

The right of "meaningful access to the courts" is not expressly articulated in the Constitution. The following constitutional provisions, however, have been identified as providing the basis for the right:

The First Amendment to the United States Constitution provides in pertinent part, "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Sixth Amendment provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The Fourteenth Amendment states in pertinent part, ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS

§ 14.1-183 Code of Virginia. Persons allowed services without fees or costs. — Any person, who is a resident of this Commonwealth, who, on account of his poverty is unable to pay fees or costs may be allowed by a court to sue or defend a suit therein, without paying fees or costs; whereupon he shall have, from any counsel whom the court may assign him, and from all officers, all needful services and process, without any fees to them therefor, except what may be included in the costs recovered from the opposite party.

§ 53.1-40 Code of Virginia. Appointment of counsel for indigent prisoners. — The judge of a circuit court in whose county or city a state correctional facility is located shall, on motion of the Commonwealth's attorney for such county or city, when he is requested so to do by the superintendent or warden of a state

correctional facility, appoint one or more discreet and competent attorneys-at-law to counsel and assist indigent prisoners therein confined regarding any legal matter relating to their incarceration.

An attorney so appointed shall be paid as directed by the court from the criminal fund reasonable compensation on an hourly basis and necessary expenses based upon monthly reports to be furnished the court by him.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

NO. _____

EDWARD W. MURRAY, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS, et al.,
Petitioners,

v.

JOSEPH M. GIARRATANO, et al.,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

The petitioners, Edward W. Murray, Gerald L. Bailes, Robert N. Baldwin, and Michael Samberg, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceedings on June 3, 1988.

OPINIONS BELOW

The Opinion of the *en banc* Court of Appeals for the Fourth Circuit is reported at 847 F.2d 1118, and is reprinted in the appendix. (App. A-1).

The memorandum opinion of the United States District Court for the Eastern District of Virginia is reported at 668 F.Supp. 511, and is reprinted in the appendix. (App. A-23).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on June 3, 1988. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Joseph M. Giarratano, a Virginia prisoner under sentence of death, initiated this civil rights action pursuant to 42 U.S.C. § 1983, by a *pro se* complaint filed in the district court on July 3, 1985. Jurisdiction was based on 28 U.S.C. §§ 1331 and 1343. By Order of May 29, 1986, the district court certified a class consisting of indigent inmates whose death sentences have been upheld on direct appeal and who do not have and cannot afford to hire attorneys to represent them in state habeas corpus proceedings. At the time of trial, thirty-two inmates were confined in Virginia under sentence of death. Only one inmate did not then have counsel.

The inmate plaintiffs asserted a constitutional entitlement to representation by counsel in state and federal post-conviction challenges to their convictions and death sentences. They based the asserted right on the Equal Protection and Due Process provisions of the Fourteenth Amendment, the Sixth Amendment, the Eighth Amendment, Article I, and the right of access to the courts.

The case was tried before the district court on July 10 and 11, 1986. By Order and Opinion of December 18, 1986, the district court determined that the inmates were entitled to individual attorneys to represent them in the preparation, filing, and prosecution of state habeas corpus actions to assure the right of meaningful access to the courts as expressed in *Bounds v. Smith*, 430 U.S. 817 (1977).

Counsel is provided for all indigent defendants accused and convicted of capital crimes in Virginia at trial and on the mandatory direct appeal to the Virginia Supreme Court. Va. Code §§ 19.2-159, 19.2-326. Presently, Virginia law does not require the appointment of counsel to represent inmates in the initiation of collateral attacks on state court judgments. As a matter of state practice, the Virginia Supreme Court has ruled that counsel must be appointed to represent a habeas corpus petitioner who presents non-frivolous claims requiring a hearing. *Darnell v. Peyton*,

208 Va. 675, 160 S.E.2d 749 (1968).

Since the enactment of the present Virginia capital punishment statutes in 1977, death row inmates have relied primarily on volunteer attorneys for assistance in their post-conviction efforts to challenge their convictions and sentences. On two occasions Virginia courts have been asked to appoint counsel for an unrepresented death row inmate to assist the inmate in the prosecution of a habeas corpus action. In both cases the courts appointed counsel. (Plaintiffs' Exhibit 34, Defendants' Exhibit 17). All death row inmates in Virginia have had the assistance of an attorney, whether volunteer or court-appointed, in pursuing state habeas corpus remedies.

Virginia prisoners have access to legal information and assistance from three sources provided by the state. Each of the three institutions housing inmates under sentence of death maintains a law library in substantial compliance with that suggested in *Bounds v. Smith*, 430 U.S. at 819 n.4. (Defendants' Exhibits 4, 9, 12). Additionally, pursuant to Va. Code § 53.1-40, attorneys have been appointed for each institution to "counsel and assist indigent prisoners therein confined regarding any legal matter relating to their incarceration." (Plaintiffs' Exhibits 12, 13; Defendants' Exhibit 6). The institutional attorneys are available to assist the inmate in the preparation of habeas corpus petitions by obtaining the records concerning the trial, including the trial transcript, appellate briefs, and orders; reviewing circumstances of the trial and other proceedings with the inmate to help identify and develop claims; providing the inmate with copies of legal materials, or conducting legal research for the prisoner; and drafting petitions for the inmate to review and file *pro se*. (Tr. pp. 299-302, 329-330).

Virginia trial level courts also have the authority to appoint counsel to represent any indigent inmate in a habeas corpus proceeding. Va. Code § 14.1-183. Such appointments are discretionary with the court and can be made, upon request, prior to the filing of any petition. Attorneys so appointed are compensated by the state for their efforts. As stated above, Virginia's death row inmates not already represented by volunteer or retained lawyers have sought appointment of counsel on only two occasions. On both occasions, the request for appointed counsel was granted.

The district court ruled that meaningful access to the courts

for these inmates could only be provided by "the continuous services of an attorney to investigate, research and present claimed violations of fundamental rights." 668 F.Supp. at 514. The district court concluded that the pool of attorneys willing to volunteer to represent death row inmates in collateral attacks on their death sentences was insufficient to meet the needs of these inmates. The state defendants were ordered to "develop a system whereby attorneys may be appointed to the death row inmates individually." 668 F.Supp. at 517. The injunctive relief ordered was limited to *state* post-conviction proceedings.

The defendants appealed to the United States Court of Appeals for the Fourth Circuit, and the plaintiffs cross-appealed. A split panel of the Fourth Circuit reversed the district court's judgment that the state was constitutionally required to provide attorneys to represent death row inmates in state collateral proceedings. On rehearing *en banc*, however, the district court's judgment was affirmed by a 6-4 vote. The *en banc* decision, like that of the district court, limited the relief to *state* habeas corpus proceedings. 847 F.2d at 1122.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit has created a new right to counsel where none is provided by the Constitution. In the name of "meaningful access to the courts," Virginia is now to be required to provide personal attorneys to represent inmates under sentence of death in the preparation and prosecution of state court collateral attacks on state criminal judgments. In reaching this result, the Fourth Circuit majority disregarded and effectively overturned applicable decisions of this Court that reject a constitutional right to post-conviction counsel, preclude a constitutionally preferred status for death row inmates in collateral proceedings, and limit the obligation on the states to provide legal assistance to inmates. Not only does it conflict with decisions of this Court, but the decision of the Fourth Circuit majority adopts an interpretation of the right of access to the courts in conflict with that articulated by every other federal circuit.

By creating a rule of special application to death-sentenced inmates, the Fourth Circuit majority has substituted its judgment of what it considers to be a desirable policy in state post-conviction proceedings for what is constitutionally required, and

has thereby preempted a legislative prerogative of the state. These circumstances demonstrate the exceptional importance of this case and the need for this Court to exercise its authority to review the judgment below.

A. THE FOURTH CIRCUIT'S UNWARRANTED EXPANSION OF *BOUNDS v. SMITH* DISREGARDS THIS COURT'S STATEMENT OF THE LIMITED OBLIGATIONS ON THE STATES UNDER THE RIGHT OF ACCESS TO THE COURTS AND CONFLICTS WITH THE INTERPRETATION OF THAT RIGHT ADOPTED BY EVERY OTHER FEDERAL CIRCUIT.

Eleven years ago, in *Bounds v. Smith*, 430 U.S. 817 (1977), this Court declared that state prisoners have a constitutional right of meaningful access to the courts. The Court specifically held that states are obligated to "assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." 430 U.S. at 828.

Bounds did not suggest that the states' obligation to provide legal assistance to inmates included providing a personal lawyer to represent each inmate. The appointment of counsel to represent inmates was mentioned only as an independent issue, and, by reference to *Ross v. Moffitt*, 417 U.S. 600 (1974), and *Johnson v. Avery*, 393 U.S. 483 (1969), the Court underscored the conclusion that there is *no* obligation on state and federal courts to appoint counsel for inmates who indicate an intention to seek post-conviction relief. 430 U.S. at 820-21, 826 n.15.

Rather, the right of "meaningful access to the courts" imposes a limited obligation on the states to make some source of legal assistance available to provide inmates a "reasonably adequate opportunity to present claimed violations of fundamental constitutional rights." 430 U.S. at 825; see *Procunier v. Martinez*, 416 U.S. 396, 419 (1974) ("reasonable opportunity to seek and receive assistance"); *Ross v. Moffitt*, 417 U.S. at 616 ("adequate opportunity to present claims fairly"); *Wolff v. McDonnell*, 418 U.S. 539, 576 (1974) ("opportunity to present"). The states clearly are not required to provide the optimal assistance conceivable. In articulating the right of access, this Court recog-

nized that the limitations of some prisoners might impair their ability to make the best use of the legal services provided, and acknowledged that a lawyer could prepare and file legal pleadings more efficiently and effectively than a layman. 430 U.S. at 825-26, 831, 841. The Court, however, specifically rejected the argument that law libraries were inadequate to provide meaningful access for inmates "ill-equipped to use" such facilities. 430 U.S. at 826.

This Court has not addressed the scope of the right of meaningful access to the courts since *Bounds*. The extension of that right by the Fourth Circuit majority to include a right to personal counsel, however, cannot be reconciled with this Court's statement of the limited nature of the states' obligation.

Before the decision in this case, all federal courts of appeals interpreted the holding of *Bounds* as defining the limits of the states' obligation: the states have been required to provide either law libraries or some form of assistance from persons trained in the law. *Carter v. Fair*, 786 F.2d 433, 435 (1st Cir. 1986); *Spates v. Manson*, 644 F.2d 80 (2d Cir. 1981); *Valentine v. Beyer*, 850 F.2d 951 (3d Cir. 1988); *Almond v. Davis*, 639 F.2d 1086 (4th Cir. 1981); *Mann v. Smith*, 796 F.2d 79 (5th Cir. 1986); *Penland v. Warren County Jail*, 759 F.2d 524 (6th Cir. 1985) (*en banc*); *Corgain v. Miller*, 708 F.2d 1241 (7th Cir. 1983); *Kelsey v. State of Minnesota*, 622 F.2d 956, 958 (8th Cir. 1980); *Lindquist v. Idaho State Board of Corrections*, 776 F.2d 851 (9th Cir. 1985); *Nordgren v. Milliken*, 762 F.2d 851, 854 (10th Cir.), *cert. denied*, 474 U.S. 1032 (1985); *Hooks v. Wainwright*, 775 F.2d 1433 (11th Cir. 1985), *cert. denied*, 107 S.Ct. 313 (1986).

Until this case, the right of meaningful access to the courts has not been interpreted as requiring a right to counsel. *See, e.g., Mann v. Smith*, 796 F.2d at 84 (*Bounds* cannot have meant to require legal assistance equivalent to the provision of a lawyer); *Carter v. Fair*, 786 F.2d at 433 (comprehensive legal representation not required); *Corgain v. Miller*, 708 F.2d at 1250 (actual attorney-client relationship not required; advice is sufficient).

What has been deemed settled law, however, has now become uncertain territory. In this case, the Fourth Circuit majority rejected a state system that included *both* forms of legal assistance specifically held by this Court in *Bounds* to satisfy the state's obligation under the right of access. The majority adopted an interpretation of the right of access that expands that right

and the corresponding obligation on the state far beyond this Court's decision in *Bounds*. The expansive reading of this right by the Fourth Circuit majority conflicts with the limited interpretations adopted by *every* other circuit. The need for uniform application of this constitutional right strongly argues in favor of this Court granting certiorari in this case.

B. THE FOURTH CIRCUIT MAJORITY HAS CREATED A RIGHT TO POST-CONVICTION COUNSEL IN DISREGARD OF THE RECENT DECISION OF THIS COURT IN *PENNSYLVANIA v. FINLEY*.

In *Pennsylvania v. Finley*, 107 S.Ct. 1990 (1987), this Court ruled that there is no constitutional right to counsel for state post-conviction attacks on state convictions. Dissenting below, Judge Wilkins noted: "We are concerned here with the identical type of proceeding addressed in *Finley*, state habeas corpus, on the heels of a clear and recent statement by the Supreme Court that there is no previously established right to counsel in state habeas corpus proceedings." 847 F.2d at 1127. The Fourth Circuit majority, however, concluded that the state's reliance on *Finley* was "misplaced." 847 F.2d at 1121.

Finley presented the issue of whether procedures articulated in *Anders v. California*, 386 U.S. 738 (1967), for attorneys seeking to withdraw from frivolous appeals, were constitutionally mandated in state post-conviction proceedings. Resolution of that issue required a determination of the constitutional basis for providing counsel in such proceedings:

Anders established a prophylactic framework that is relevant when, and only when, a litigant has a previously established constitutional right to counsel. We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks to their convictions, and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further.

107 S.Ct. at 1993 (citation omitted).

The Court canvassed the possible constitutional grounds upon which a right to post-conviction counsel could be predicated, *including the right of "meaningful access,"* and concluded

that the Constitution does not obligate the states to provide attorneys in a post-conviction proceeding. 107 S.Ct. at 1994. State court collateral attack is even further removed from the trial than direct appeal. It is not a criminal proceeding; it is civil in nature. In *Ross v. Moffitt*, the Court held that a litigant is not denied "meaningful access to the courts" because the state does not provide an attorney to assist in discretionary appellate review of a conviction. 417 U.S. at 614-15. In *Finley*, the Court stated: "We think the same conclusion necessarily obtains with respect to post-conviction review." 107 S.Ct. at 1994.

The decision of the Fourth Circuit majority is "impossible to square" with this Court's unambiguous statement that no right to counsel for state post-conviction review is mandated by the Constitution. 847 F.2d at 1123 (Wilkinson, J., dissenting and concurring). In light of *Finley*'s clear teaching, this Court should exercise its certiorari power to review, if not summarily reverse, the decision below which has manufactured a "right" to counsel where no such right exists.

C. THE FOURTH CIRCUIT'S ESTABLISHMENT OF A PREFERRED STATUS FOR DEATH ROW INMATES CREATES AN IRRECONCILABLE CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The Constitution does not require that the states provide post-conviction review of criminal judgments. *Finley*, 107 S.Ct. at 1994. While habeas corpus proceedings play an important role in the review of criminal judgments, that role is secondary and limited. As this Court has specifically ruled, direct appeal is the primary avenue for review of a conviction and sentence, and "death penalty cases are no exception." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983) (emphasis added).

The Fourth Circuit majority sought to distinguish *Finley* because it did not involve a death sentence. Citing the "significant constitutional difference between the death penalty and lesser punishments," the majority asserted that the unique nature of the penalty requires the appointment of counsel for state post-conviction challenges. 847 F.2d at 1122. By creating a special exception for death cases, however, the Fourth Circuit

majority only heightened its conflict with decisions of this Court. Nothing in this Court's decisions in capital cases recognizes a special status for habeas corpus petitioners challenging death sentences.

There is no presumption that a death sentence is inherently suspect. Additional procedural protections required for capital trials and sentencing are designed to assure a reliable and accurate determination that death is the appropriate penalty in a particular case. Such procedures are not applicable in the context of a post-conviction proceeding. See *Ford v. Wainwright*, 477 U.S. 399, 425 (1986) (Powell, J., concurring). A death sentence is a constitutionally permissible punishment, entitled to the same presumption of finality and legality after the process of direct review as any other sentence.

Neither the qualitative difference of the death penalty, nor any constitutional provision, requires preferred procedures for persons challenging death sentences in collateral proceedings. See *Smith v. Murray*, 477 U.S. 527, 538 (1986) (no *per se* exception to application of procedural default bar for capital cases); *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (no different standard for ineffective assistance of counsel claims for death cases); *Barefoot v. Estelle*, 463 U.S. at 893 (no automatic certificate of probable cause for death cases).

The Fourth Circuit majority created an exceptional application of the right of meaningful access to the courts for death row inmates because of the supposed complexity and difficulty of the legal work involved in challenging a death penalty. The majority thus adopted a *per se* rule that a law library and the assistance of an institutional attorney are inadequate for these inmates. There is no basis, however, for an across-the-board assumption that all cases involving a death sentence are so inherently complex that no death row inmate can present his claims without a personal attorney to represent him. Nor can it be presumed that an inmate convicted of a non-capital offense is confronted with intrinsically less difficult or complex issues. The sweeping generalization that death row inmates require representation by individual counsel to ensure access to the courts creates an entirely artificial and arbitrary delineation of rights, certain to provoke further attempts to expand a right to post-conviction counsel.

Virginia's choice of means to provide legal assistance was rejected by the courts below for reasons supposedly peculiar to

death row inmates. Both the Fourth Circuit majority and the district court concluded that providing a law library did not satisfy the state's obligation under *Bounds*.¹ The availability of institutional attorneys was deemed insufficient because of the scope of such assistance.² Both the district court and the Fourth Circuit majority relied on the erroneous conclusion that appointment of counsel to represent inmates was available under state law only after a petition raising non-frivolous claims was filed.³

The Virginia system was not rejected by the lower courts based on any demonstrated failure of Virginia to provide legal assistance as mandated by *Bounds*. Death row inmates in Virginia have relied almost exclusively on an alternative system of privately recruited volunteer attorneys, and have not used the assistance presently available.⁴ Based upon fears that their efforts to obtain sufficient volunteers in the future will fail, they have sought to impose upon the Commonwealth, by federal court injunction, the obligation of providing legal assistance in the form that they prefer. The lower courts have acceded to the inmates wishes in this regard, and have added their opinion as to what form of legal assistance is most desirable in state post-conviction proceedings. That policy matter, however, is one properly committed to the judgment of the states. *Finley*, 107 S.Ct. at 1995.

The Fourth Circuit majority's decision is not limited in its application by facts peculiar to Virginia's laws and procedures or

¹ The district court found that death row inmates are incapable of effectively using law books because of the limited amount of time death row inmates had to prepare and present their petitions; the complexity and difficulty of the legal work; and the emotional instability of inmates preparing themselves for impending death. 668 F.Supp. at 513.

² They do not perform exhaustive factual inquiries, sign pleadings or appear in court on behalf of the inmates; they act as legal advisors -- not counsel of record. 668 F.Supp. at 514.

³ The Virginia statute authorizing the appointment of counsel, § 14.1-183, and state court decisions, see *Darnell v. Peyton*, 208 Va. 675, 160 S.E.2d 749 (1968), do not contain such a limitation. The record affirmatively shows that state courts have appointed counsel prior to the filing of any petition. (Defendant's Exhibit 17).

⁴ The defendants have consistently asserted the lack of a case or controversy because of the inmates' failure to use the forms of assistance already available in Virginia. The Fourth Circuit majority did not address the issue. In a separate concurring and dissenting opinion, Judge Widener noted the plaintiffs' lack of standing to pursue this case because they have always had counsel. 847 F.2d at 1122.

by the nature of Virginia's death row inmates. The decision is, by its very terms, applicable to any case involving a death-sentenced inmate:

Because of the peculiar nature of the death penalty, we find it difficult to envision any situation in which appointed counsel would not be required in state post-conviction proceedings when a prisoner under the sentence of death could not afford an attorney.

847 F.2d at 1122 n. 8.

The court below has thus created a new right to counsel without any constitutional basis, justified only by reasons that lack constitutional significance. By establishing a constitutionally preferred status for death row inmates, the Fourth Circuit majority has ignored applicable decisions of this Court that reject such a status. This decision is certain to cause confusion among the other circuits, and warrants this Court's exercise of its certiorari power.

D. THE CONSEQUENCES OF A RIGHT TO COUNSEL FOR DEATH-SENTENCED INMATES IN STATE COLLATERAL CHALLENGES TO THEIR CONVICTIONS UNDERScore THE SPECIAL IMPORTANCE OF THIS CASE.

This Court is particularly aware of the confusion and delay that is now the hallmark of capital post-conviction litigation. The administration of capital punishment is already subject to a process of multiple layers of review of state court criminal convictions that consumes the time and resources of the litigants and the courts. The decision of the Fourth Circuit majority will certainly produce even additional layers of litigation that will further frustrate the efforts of the states to enforce their criminal laws.

The mischief of this newly created constitutional "right" cannot be ignored. If the decision below is permitted to stand, the attorney who unsuccessfully represents a death row inmate in a post-conviction proceeding, like the attorney who defended the inmate at trial, will become the focus of a new round of post-conviction challenge. This Court has recognized that the right to counsel, if constitutionally mandated, carries with it the right to effective counsel. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985);

Strickland v. Washington, 466 U.S. 668, 686 (1984); cf. *Pennsylvania v. Finley*, 107 S.Ct. at 1994.; *Wainwright v. Torna*, 455 U.S. 586, 588 n.4 (1982). In an area of the law already marked by protracted and repetitive litigation, the Fourth Circuit majority's ruling injects a palpable danger of infinite delay:

Although the new right to post-conviction counsel does not appear to arise from the Sixth Amendment, it will presumably carry with it some entitlement to 'effective assistance.' Provision of counsel on constitutional grounds also brings with it a panoply of procedural requirements. . . . It is hard to imagine a more fertile ground for litigation than that provided by these entitlements. *The likely result will be additional cycles of prisoner litigation in every capital case, each ever further removed from the proper focus of criminal adjudication — the trial itself.*

847 F.2d at 1125 (emphasis added) (Wilkinson, J., dissenting and concurring). The creation of a federal constitutional right to counsel for death row inmates in state post-conviction proceedings will no doubt provoke a potentially endless succession of collateral proceedings in which the petitioner invokes a right to counsel to challenge the effectiveness of the next previous attorney.⁵ "The result is akin to the effect created when a mirror is held facing another mirror, the image repeating itself to infinity." *Evitts v. Lucey*, 469 U.S. at 411 (Rehnquist, J., dissenting).

Significantly, the Fourth Circuit majority and the district court have created an entitlement to a personal lawyer for death row inmates in state court collateral proceedings, but have not granted such a right for federal habeas corpus actions involving the same inmates challenging the same convictions and sentences. Thus, the lower courts in this case have been willing to thrust upon the Commonwealth of Virginia a system which they are unwilling or unable to force upon the federal government. The remarkable result is that the Federal Constitution is deemed to require greater protection for a state inmate in state court than for the same inmate in federal court.

⁵ At least one Virginia death row inmate has already raised a claim of ineffective assistance of state habeas counsel as the basis for a successive federal habeas corpus petition. In a decision issued before the present case was argued, the Fourth Circuit rejected the prisoner's claim. *Whitley v. Muncy*, 823 F.2d 55 (4th Cir. 1987).

This federal intrusion into a matter peculiarly committed to the states' authority — state post-conviction review of a state criminal judgment — "disregards the independence of state judicial systems and the respective spheres of legislative and judicial competence." 847 F.2d at 1123. (Wilkinson, J., dissenting and concurring). This Court has repeatedly stressed the interests of the state in the enforcement of its criminal laws in the context of federal habeas corpus review of state court criminal convictions. The exhaustion requirement of the federal habeas corpus statute, see 28 U.S.C. § 2254(b) and (c), the deference to state court factual findings, see 28 U.S.C. § 2254(d), and the enforcement of state court procedural rules, see *Wainwright v. Sykes*, 433 U.S. 72 (1977), all reflect a respect in our federal system for the state's interest in its criminal judgments. That interest is certainly paramount to any federal interest which has been identified in this case.⁶ The effect of this intrusion, as Judge Wilkinson noted in dissent below, is that "[s]tate post-conviction remedies will now move one step closer to the status of a federal protectorate." 847 F.2d at 1125.

This Court, however, has already rejected the premise that the Federal Constitution dictates the precise form that state post-conviction proceedings should assume. "On the contrary, in this area the States have substantial discretion to develop and implement programs to aid prisoners seeking to secure post-conviction review." *Finley*, 107 S.Ct. at 1995.

Thirty-seven states and the federal government provide for application of the death penalty as a permissible punishment for the most serious crimes. At trial in this case, plaintiffs estimated that two-thirds of the states with capital punishment statutes do not provide lawyers as a matter of right for inmates seeking relief from their sentences in state post-conviction actions. Of the remaining states, a variety of means has been chosen to provide counsel to death row inmates as a matter of state law or practice, ranging from Florida's Office of Capital Collateral Representative, Fla. Stat. Ann. §§ 27.7001 et seq. (West 1988), to state statutes and court rules allowing the appointment of counsel in

⁶ The effect of the intrusion of the federal judiciary into state proceedings is further magnified by the relief ordered in this case. The injunctive relief ordered guarantees the continuing supervision of post-conviction proceedings by the district court and the invocation by the inmates of the contempt power of the federal court to challenge the adequacy of the state system.

state post-conviction proceedings. *See, e.g.,* Ariz. Rev. Stat. Ann., Rules of Crim. Proc., Rule 32.5(b); Colo. Rev. Stat. § 21-1-104 (1986); Ill. Rev. Stat. ch.38, § 122-4 (1988); Miss. Code Ann. § 99-39-23 (1987). If the decision below requiring the automatic provision of personal counsel to represent death row inmates in state post-conviction proceedings is permitted to stand, all states which administer a system of capital punishment must expect challenges to their post-conviction procedures on the basis of this newly-found constitutional right to counsel.

The decision of the court below ignores the consequences of the "right" that has been created. The interests of comity and finality that this Court has stressed as primary considerations when the federal judiciary reviews state court criminal judgments and the interests of the state in determining for itself what means of access to provide have been subordinated to the Fourth Circuit majority's notion of how state habeas corpus actions should proceed. This significant and unjustified intrusion into the conduct of state proceedings raises an issue of importance to all states that must be resolved by this Court.

CONCLUSION

The question presented here is clearly one of exceptional importance. The expansion of the right of access to the courts to include a new right to counsel for death-sentenced inmates in state collateral attacks represents a radical departure from existing law and an unprecedented intrusion by a federal court into matters peculiarly the responsibility and concern of the states. In the process, the decision below raises doubts about the interpretation of the right of access to the courts presently adopted by all federal circuits, and is certain to cause confusion in the states' good faith efforts to meet their obligations under *Bounds v. Smith*.

By creating a special and preferred status for death row inmates in state habeas corpus proceedings, the courts below have institutionalized the misguided concept that a death sentence entitles an inmate to more opportunities to litigate and relitigate issues that are ever further removed from the proper focus of such litigation — the trial. The ironic result is that those who have committed the most reprehensible offenses against our society are granted the greatest protection from punishment, and

the ultimate punishment for the ultimate offenses will be delayed so long as to be rendered meaningless. That such a result has been obtained in this case through judicial fiat rather than legislative choice demonstrates the need for review by this Court.

Respectfully submitted,

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August 1988

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 87-7518

**JOSEPH M. GIARRATANO; JOHNNY
WATKINS, JR.; RICHARD T. BOGGS**

Plaintiffs - Appellees

versus

**EDWARD W. MURRAY, Director,
Virginia Department of Corrections;
GERALD L. BALILES, Governor;
ROBERT N. BALDWIN;
MICHAEL SAMBERG,
Warden, in their official capacities;**

Defendants - Appellants

AMERICAN BAR ASSOCIATION

Amicus Curiae

No. 87-7519

**JOSEPH M. GIARRATANO; JOHNNY
WATKINS, JR.; RICHARD T. BOGGS**

Plaintiffs - Appellants

versus

**EDWARD W. MURRAY, Director,
Virginia Department of Corrections;
GERALD L. BALILES, Governor;
ROBERT N. BALDWIN;
MICHAEL SAMBERG,
Warden, in their official capacities;**

Defendants - Appellees

AMERICAN BAR ASSOCIATION

Amicus Curiae

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., Senior District Judge. (CA-85-655-R)

Argued: April 6, 1988

Decided: June 3, 1988

Before WINTER, Chief Judge, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN, CHAPMAN, WILKINSON, and WILKINS, Circuit Judges.

Robert Q. Harris, Assistant Attorney General (Mary Sue Terry, Attorney General; Richard F. Gorman, III, Assistant Attorney General; Guy W. Horsley, Jr., Senior Assistant Attorney General on brief) for Appellants. Steven E. Landers (Jay Topkis, Alisa D. Shudofsky, Clyde Allison, PAUL, WEISS, RIFKIND, WHARTON & GARRISON; Gerald T. Zerkin, ZERKIN, HEARD & KOZAK; Martha A. Geer, SMITH, PATTERSON, FOLLIN, CURTIS, JAMES & HARKAVY; Jonathan D. Sasser, MOORE & VAN ALLEN on brief) for Appellees. (Eugene C. Thomas, Ronald J. Tabak, Sara-Ann Determan, Charles G. Cole, AMERICAN BAR ASSOCIATION on brief) for Amicus Curiae.

HALL, Circuit Judge:

This is a consolidated appeal and cross-appeal arising from a class action initiated by death row inmates in the State of Virginia pursuant to 42 U.S.C. § 1983. The State appeals an order of the district court requiring the appointment of counsel for inmates challenging their death penalty through state habeas proceedings. The inmate class cross-appeals the district court's refusal to order the appointment of counsel in federal post-conviction proceedings. By a majority vote, a panel of this Court reversed that portion of the judgment of the district court requiring appointment of counsel for death row inmates in state proceedings. *Giarratano, et al. v. Murray, et al.*, 836 F.2d 1421 (4th Cir. 1988). Thereafter, a majority of the Court voted to reconsider the case *en banc*. A majority of the *en banc* Court has now voted to affirm the judgment of the district court for the reasons set forth below.

I.

Virginia currently provides three forms of legal assistance to death row inmates pursuing post-conviction claims — law libraries, unit attorneys, and appointed attorneys. Death row inmates are housed at Mecklenberg Correctional Center, the Virginia State Penitentiary and the Powhatan Correctional Center. Each of these three centers maintain law libraries. Mecklenberg death row inmates are permitted two half-day periods weekly; death row inmates at Powhatan and the Penitentiary are not permitted to visit the libraries, but may borrow materials for use in their cells.

Unit attorneys are assigned to the various penal institutions to assist inmates in any matter related to incarceration. In addition to these unit attorneys, Virginia provides for the appointment of counsel, under certain circumstances, to indigent inmates who have been residents of Virginia for six months.¹ Va. Code § 14.1-183 (1950). Under this provision the courts in Virgi-

¹ Va. Code § 14.1-183 was amended in 1987 to delete the six-month residency requirement. (Repl. Vol. 1985 & Supp. 1987). However, this change in the Code does not alter our disposition of this appeal.

nia have the discretion to appoint counsel to represent inmates proceeding *in forma pauperis*. Death row inmates in Virginia, seeking collateral relief from their sentences through state post-conviction remedies, have traditionally had no automatic right to the assistance of counsel.

This action was originally brought by Joseph M. Giarra-tano, a Virginia death row inmate, who sought declaratory and injunctive relief with respect to post-conviction assistance of counsel. The district court permitted other death row inmates to intervene in the suit and granted their motion for class certification. The class consists of:

all persons, now and in the future, sentenced to death in Virginia, whose sentences have been or are subsequently affirmed by the Virginia Supreme Court and who either (1) cannot afford to retain and do not have attorneys to represent them in connection with their post-conviction proceedings, or (2) could not afford to retain and did not have attorneys to represent them in connection with a particular post-conviction proceeding.

The death row inmates had presented a number of constitutional grounds in support of their claim of right to post-conviction assistance of counsel.² However, the district court granted relief only on the basis of the right of access to the courts as stated in *Bounds v. Smith*, 430 U.S. 817 (1977). In *Bounds*, the Supreme Court held that prison authorities are required to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or assistance from legally trained personnel.

The district court found, based upon evidence presented at the trial, that the death row inmates were incapable of effectively using law books to raise their post-conviction claims. Three considerations led the district court to this conclusion:

- (1) the limited amount of time death row inmates had to prepare and present their petitions to the courts;
- (2) the complexity and difficulty of the legal work; and
- (3) the emotional instability of inmates preparing themselves for impending death.

The district court consequently found that the provision of a library did little to satisfy Virginia's obligation to assist death row inmates in the preparation and filing of meaningful legal papers as required by *Bounds*. The district court then turned to the examination of the assistance presently provided by Virginia to determine if it met the constitutional requirement.

² These grounds included the sixth amendment, eighth amendment, fourteenth amendment due process clause, Article I, the equal protection clause, and the right of access to the courts.

The district court found that the assistance provided by unit attorneys was inadequate both in fact and in law. Evidence produced at trial indicated that seven institutional attorneys were attempting to meet the needs of over 2,000 prisoners and that each attorney could not adequately handle more than one capital case at a time. In addition, the unit attorneys were not hired to work full time. The district court also noted that even if Virginia appointed unit attorneys to service only the death row inmates, its duty under *Bounds* would not be fulfilled because the scope of assistance was too limited.³ The district court concluded that only the continuous services of an attorney to investigate, research, and present claimed violations of fundamental rights could provide death row inmates the meaningful access to the courts guaranteed by the Constitution and that the assistance of unit attorneys fell short of this requirement.

The district court then turned to the second form of legal assistance, provided by appointed attorneys, and found that the timing of the appointment was a fatal defect with respect to the requirements of *Bounds*. Appointments are made under Va. Code § 14.1-183 only after a petition is filed and then only if a non-frivolous claim is raised. Thus, the district court reasoned, the inmate would not receive the attorney's assistance in the critical stages of developing his claims.⁴ The district court concluded that in view of the inadequacy of the assistance provided by Virginia and the scarcity of competent and willing counsel to assist indigent death row inmates seeking post-conviction remedies,⁵ such relief was necessary and warranted.⁶ In order to

³ The evidence indicated that the unit attorneys do not perform factual inquiries, sign pleadings, or make court appearances. Instead, they act only as legal advisors.

⁴ This assistance is particularly critical in Virginia where all claims, the facts of which are known at the time of filing, must be included in that petition as they may not be raised successfully in a subsequent filing and those claims also could not be considered in federal court because federal courts generally may not consider claims barred by Virginia procedural rules. *Whitley v. Bair*, 802 F.2d 1487 (4th Cir. 1986), cert. denied, 107 S.Ct. 1618 (1987), and *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661 (1986).

⁵ The district court found that in the past Virginia had perceived no need to provide counsel to death row inmates pursuing post-conviction relief because attorneys volunteered their services or were recruited to provide pro bono assistance to death row prisoners. However, the evidence presented at trial established that few attorneys are now willing to voluntarily represent death row inmates in post conviction efforts.

⁶ (See next page.)

provide effective relief, the district court held that Virginia must provide death row inmates trained legal assistance in their state post-conviction proceedings.

II.

On appeal, the State contends that the constitutional right of access to the courts does not require appointment of counsel for death row inmates in state habeas corpus proceedings and that Virginia provides constitutionally adequate legal assistance to death row inmates. Alternatively, the State argues that the Supreme Court has determined in *Pennsylvania v. Finley*, ___ U.S. ___, 107 S.Ct. 1990 (1987), that there is no constitutional right to counsel in state post-conviction proceedings. On cross-appeal, the death row inmates contend that the district court's reading of *Bounds* limiting its application to state post-conviction proceedings, does not adhere to the current state of the law. We disagree with all of these contentions and address them seriatim.

We are persuaded by the well reasoned opinion of the district court that legal assistance presently available to Virginia death row inmates in state post-conviction proceedings fails to meet the constitutional requirement of meaningful access to the courts as set forth in *Bounds*. It is now established beyond a doubt that prisoners have a constitutional right of access to the courts. The district court evaluated the existing Virginia program "as a whole to ascertain its compliance with constitutional standards." *Bounds*, 430 U.S. at 832. The district court made

⁶ The district court's order specifically provided that:

- (1) indigent Virginia death row inmates are entitled to the appointment of counsel upon request to assist them in pursuing habeas corpus relief in the state courts;
- (2) defendants shall develop a system whereby attorneys may be appointed to the death row inmates individually as provided above;
- (3) plaintiffs are entitled to their taxable costs and attorney fees as provided by law; and
- (4) counsel for the parties shall attempt to reach an agreement as to counsel fees. Any such agreement shall be without prejudice to defendants' right to contest the right of plaintiffs to recover same.

findings of fact based upon the record which indicated that Virginia was not in compliance with constitutional rights of access to the courts. Under *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), we cannot say these findings of fact are clearly erroneous. Nor do we find that the district court abused its discretion in formulating the remedy in this case. *Milliken v. Bradley*, (*Milliken II*), 433 U.S. 267 (1977).

The State's reliance on *Pennsylvania v. Finley*, *supra*, as authority for their contention that state prisoners are not constitutionally entitled to state-supplied attorneys in post-conviction proceedings is misplaced. In *Finley*, the Supreme Court held that the procedural framework of *Anders v. California*, 386 U.S. 738 (1967), does not apply to the situation in which counsel appointed pursuant to Pennsylvania state law later seeks to withdraw from the representation without first filing a brief. The Court stated that because Pennsylvania was not constitutionally required to provide counsel in post-conviction proceedings, then due process did not require that the counsel's actions comport with the *Anders* procedures.⁷ However, *Finley* was not a meaningful access case, nor did it address the rule enunciated in *Bounds v. Smith*. Most significantly, *Finley* did not involve the death penalty.

Both society and affected individuals have a compelling interest in insuring that death sentences have been constitutionally imposed. Moreover, the complexity and difficulty of the legal work involved in challenging a death penalty require particular safeguards in order to insure meaningful access. The Supreme Court has stated that "there is a significant constitutional difference between the death penalty and lesser punishments." *Beck v. Alabama*, 447 U.S. 625, 637 (1980). In addition, the Supreme Court recently held that matters affecting an already condemned prisoner call for "no less stringent standards than those demanded in any other aspect of a capital proceeding." *Ford v. Wainwright*, 477 U.S. 399, 411-12 (1986). *See also*, *Booth v. Maryland*, ___ U.S. ___, 107 S.Ct. 2529 (1987) ("death is a punishment different from all other sanctions.")⁸ We do not,

⁷ The *Anders* procedures require counsel to perform a conscientious evaluation of the record, to write a brief referring to arguable support in the record and to give notice to the client.

⁸ Because of the peculiar nature of the death penalty, we find it difficult to envision any situation in which appointed counsel would not be required in

(Continued on next page)

therefore, read *Finley* as suggesting that the counsel cannot be required under the unique circumstances of post-conviction proceedings involving a challenge to the death penalty.

III.

The death row inmates argue that the district court erred in denying counsel for federal habeas corpus and certiorari petitions. We disagree. In *Ross v. Moffitt*, 417 U.S. 600 (1974), the Supreme Court rejected a claim that states must appoint counsel for indigents seeking a writ of certiorari. The Court also observed that in considering a writ of certiorari it would have available appellate briefs, a transcript and state court opinions. Similarly, a federal court considering a petition for habeas corpus would also have briefs of counsel, a transcript and opinions because of the exhaustion of remedies requirement.

Virginia provides for a mandatory appeal for capital convictions and death sentences and counsel is provided for this appeal. The death row inmates would have available the appellate briefs, transcripts and state court opinions to use in their writs of certiorari. If the inmates are provided with court-appointed attorneys in their state post-conviction proceedings, they will have briefs, transcripts and opinions to use in their federal habeas corpus proceedings. We conclude that the provision of assistance of attorneys at these points insure that the inmates are provided with meaningful access to the federal courts in their federal post-conviction proceedings.

IV.

Accordingly, for all the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

⁸ (Continued from previous page.) state post-conviction proceedings when a prisoner under the sentence of death could not afford an attorney.

WIDENER, Circuit Judge, concurring and dissenting:

I concur in Judge Wilkins' separate opinion without reservation, but I would add a few words.

I

I am doubtful indeed that the plaintiffs in this case have standing to prosecute their case. As Judge Wilkins has demonstrated in his dissenting opinion "...the record does clearly establish that all death row inmates have always been represented by counsel in state post-conviction proceedings." The majority opinion does not refute this factual statement.

In *Allen v. Wright*, 468 U.S. 737 (1984), the Court stated that "[t]he requirement of standing, however, has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." 468 U.S. at 751. The Court relied for that proposition on its recent opinion in *Valley Forge College v. Americans United*, 454 U.S. 464 (1982). Because the plaintiffs and their class have always had appointed attorneys upon request, I suggest they have no standing to prosecute this case.

This suggestion, however, does not meet with favor, so I will continue. Cf. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981).

II

I am at a loss to understand the logic of the majority decision which holds that appointed attorneys are not required in federal habeas corpus proceedings which examine the merits of the prisoners' claims but are required in state habeas corpus proceedings which, even if unsuccessful (as must be contemplated in the context present here), go no further than exhaustion of state remedies and fact finding.

III

One cannot but read the majority opinion without the feeling that the Commonwealth considers death row inmates some

kind of second class citizens who get second class service, for, when access to the federal courts is provided, *sl. op. p. 11*; attorneys are not required, *sl. op. p. 10-11*, but, when access to the state courts is provided, attorneys are. Only lightly veiled is the inference that neither the courts nor the legislature of Virginia see fit to take proper care of those unfortunates.

An example which refutes this implied charge of insensitivity is Virginia's treatment of those accused of felony. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court established the right under the federal Constitution that one accused of felony, if indigent, has the right to have an attorney represent him in the criminal proceeding. Almost 70 years before, in *Barnes v. Commonwealth*, 23 S.E. 784 (Va. 1895), the Supreme Court of Virginia established that same right under the Virginia Constitution: "Every person convicted of crime has a constitutional right to have counsel to aid him in making his defense, but no one is compelled to have counsel." 23 S.E. at 787. And the Court added that "in the defense of one 'who has the double misfortune to be stricken with poverty and accused of crime. No. . . [attorney] is at liberty to decline such appointment, and few it is hoped would be disposed to do so.'" 23 S.E. at 6787, quoting Cooley on Constitutional Limitations. The *Barnes* decision has been consistently followed in Virginia ever since, and indeed was codified in 1940, more than 20 years before *Gideon*. Virginia Acts of Assembly, 1940, ch. 218.

So, neither the courts nor the legislature of the Commonwealth has been insensitive to the needs of those accused of crime, and other Virginia statutes yet provide for the obligatory appointment of counsel in habeas corpus proceedings where a hearing is to be held, as Judge Wilkins demonstrates in his opinion, but which appointment authority has in fact been honored by the Virginia courts in all cases as the record demonstrates, even when not obliged.

In sum, I do not agree with either the tenor or effect of the majority decision.

WILKINSON, Circuit Judge, concurring in part and dissenting in part:

I join Judge Wilkins' concurring and dissenting opinion. He demonstrates well that the majority's holding is impossible to square with the Supreme Court's decisions in *Pennsylvania v. Finley*, 107 S. Ct. 1990 (1987), and *Ross v. Moffitt*, 417 U.S. 600 (1974). This creation of a right *sans* constitutional basis not only contravenes Supreme Court precedent but also disregards the independence of state judicial systems and the respective spheres of legislative and judicial competence.

The federal interest in the form of state post-conviction review is an attenuated one. It is beyond question that a state has no constitutional obligation to provide post-conviction review. *E.g.*, *Finley*, 107 S. Ct. at 1994. This is so because post-conviction relief is not a part of the criminal trial itself, but a separate civil proceeding. *Id.* The plaintiffs in this case do not seek to have lawyers appointed at state expense in order to defend themselves from state allegations of which they are presumed innocent. Rather, they seek the services of a lawyer as a sword to overturn a prior determination of guilt that is presumed to be valid. *Ross*, 417 U.S. at 610-11.

This analysis applies with equal force in capital cases. "[D]irect appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). Once the direct appeal process is complete, a presumption of legality and finality attaches to the conviction and sentence. *Id.* Although the Constitution requires that the death penalty may be imposed only through procedures that provide the highest degree of reliability, there is no support for the view that death penalty cases are subject to a separate set of standards for post-conviction review. *See, e.g.*, *Smith v. Murray*, 106 S. Ct. 2661, 2668 (1986) (rejecting a separate standard for procedural foreclosure in capital cases).

The limited scope of federal habeas corpus further demonstrates that the federal interest in the form of state post-conviction relief is minimal. The intrusion on state interests that federal habeas entails may be exercised only for a narrow purpose, to challenge unconstitutional confinement. Thus the Courts of Appeals overwhelmingly hold that federal habeas corpus is not available to challenge alleged defects in state post-

conviction proceedings. See *Kirby v. Dutton*, 794 F.2d 245 (6th Cir. 1986); *Vail v. Procunier*, 747 F.2d 277 (5th Cir. 1984); *Mitchell v. Wyrick*, 727 F.2d 773 (8th Cir. 1984). The principle expressed in these habeas cases is directly applicable to the section 1983 claims presented here. The plaintiffs' claims have drawn the federal courts into an area where the federal interest is small and the costs to federal-state relations will be great.

The majority has lost sight of the fact that in our dual system, the states no less than the federal government are responsible for the protection of constitutional rights. Where a state criminal proceeding is involved, the Supreme Court has emphasized that the state's role is paramount. See, e.g., *Murray v. Carrier*, 106 S. Ct. 2639 (1986); *Rose v. Lundy*, 455 U.S. 509 (1982); *Sumner v. Mata*, 449 U.S. 539 (1981); *Wainwright v. Sykes*, 433 U.S. 72 (1977). Federal courts should act with caution where they are asked to create novel rights that intrude significantly on state functions. The lack of such caution is all the more startling here, where Virginia provides unit attorneys at its prison facilities to assist death row inmates and where Virginia courts are required to appoint counsel to represent such inmates in presenting nonfrivolous claims. *Darnell v. Payton*, 160 S.E.2d 749 (Va. 1968).

I can perceive no basis for the district court's decision other than a policy judgment that it would be a good idea to provide state inmates counsel at state expense to pursue state post-conviction remedies. That policy judgment may well be correct, but the judgment is for the state legislature, the state Attorney General's office, and the state courts to make, not the federal judiciary. We have been presented with much stimulating argument on the benefits that state-provided counsel would bring, but far less on the constitutional basis for requiring it. We have been invited to issue what is at bottom a legislative proclamation of displeasure with a controversial penalty which the Supreme Court has held is within the province of the states to impose.

The nature of the factual findings on which this proclamation would be based does not lessen my objections. The majority relies on the deference that is accorded to particularized findings of fact by trial courts. Yet the findings of fact in this case are broad generalizations. Indeed, if this case turns on the *individual* state of mind of the condemned prisoner, or the amount of time between conviction and imposition of a *particular* sentence, it is

difficult to see how the commonality requirement of Fed. R. Civ. P. 23 could ever have been met. The class action device undoubtedly widens the focus of a case, but it should not be taken as a grant of unlimited federal judicial authority.

Judicial legislation brings with it unique costs. By purporting to base the requirement of state post-conviction counsel in the Constitution, the court has created a rigid rule that may not readily be altered in the event of unforeseen results. Although the new right to post-conviction counsel does not appear to arise from the Sixth Amendment, it will presumably carry with it some entitlement to "effective assistance." Provision of counsel on constitutional grounds also brings with it a panoply of procedural requirements such as those at issue in *Finley*, *supra* (addressing procedural requirements for withdrawal of counsel under *Anders v. California*, 386 U.S. 738 (1967)). What is more, by analogy to previous "meaningful access" cases, future plaintiffs are likely to argue that they are entitled to counsel in section 1983 suits as well. Cf. *Wolff v. McDonnell*, 418 U.S. 539, 577-80 (1974). It is hard to imagine a more fertile ground for litigation than that provided by these entitlements. The likely result will be additional cycles of prisoner litigation in every capital case, each ever further removed from the proper focus of criminal adjudication — the trial itself.

State post-conviction remedies will now move one step closer to the status of a federal protectorate. The irony is that the development of state post-trial remedies has always held substantial promise that the states themselves would assume the primary responsibility for collateral review of state criminal convictions. If every state initiative is to involve yet another blanket of federal administrative oversight, the capacity and incentives for the states to undertake meaningful reforms will disappear. The guarantees of our Bill of Rights provide important federal safeguards for state criminal trials; they have not to this point been thought to impose a federal model of state post-conviction review.

Judge Chapman has asked to be shown as joining in this opinion.

WILKINS, Circuit Judge, concurring in part and dissenting in part:

The question before us is whether the Commonwealth of Virginia must automatically, upon request, provide death row inmates with appointed counsel to prepare and file state or federal post-conviction petitions in order to meet its obligation under *Bounds v. Smith*, 430 U.S. 817 (1977). Under the guise of meaningful access, the majority has established a right to appointed counsel where none is required by the Constitution. Therefore, while I concur with the majority that there is no right to assistance of counsel with regard to federal petitions, I respectfully dissent with regard to state petitions.

The district court clearly erred in concluding that the Commonwealth of Virginia was not meeting its obligation under *Bounds* to provide death row inmates with meaningful access to the courts. Further, there is no factual or legal justification for requiring a *per se* exception for this class of inmates.

I.

In *Bounds*, the Supreme Court held that the constitutional right of access to the courts is satisfied by providing inmates "adequate law libraries or adequate assistance from persons trained in the law." 430 U.S. at 828. Except as to death row inmates, the fact that Virginia is in full compliance with *Bounds* is not disputed. Even the inmate who initiated this action, Giaratano, conceded that Virginia provides a "decent" law library which includes Federal Supplement, Federal Reports, United States Supreme Court Reporter, the Federal Digest, Virginia Reports, and the United States Code. Also, death row inmates are provided copies of the transcript, briefs, and state court opinion from the initial automatic appeal of their conviction.

In addition to satisfying the requirements of meaningful access by providing an adequate law library, Virginia also provides a system of institutional attorneys to assist inmates. Although the majority states that Virginia institutional attorneys, approximately two or three per facility, are "attempting to meet the needs of over 2,000 prisoners," the record does not establish how many of those prisoners are actually involved in post-conviction or other litigation. But the record does clearly

establish that all death row inmates have always been represented by counsel in state post-conviction proceedings.

Further, counsel is appointed under Va. Code Ann. § 14.1-183 (1950, Repl. Vol. 1985 & Supp. 1987) for any state post-conviction petition which raises a nonfrivolous issue and requires a hearing. Virginia also allows liberal amendment to *pro se* habeas corpus petitions. Plaintiffs' expert on Virginia post-conviction proceedings testified that he had no firsthand knowledge of a Virginia Circuit Court ever denying amendment to a habeas corpus petition in a capital case.

A. Meaningful Access and *Pennsylvania v. Finley*

After the district court rendered its decision the Supreme Court decided *Pennsylvania v. Finley*, 481 U.S. ___, 95 L.Ed. 2d 539 (1987). In that case the Court held that the procedures articulated in *Anders v. California*, 386 U.S. 738 (1967), which must be satisfied before appointed counsel may withdraw from a frivolous appeal, do not apply to state post-conviction proceedings because there is no constitutional right to counsel in those proceedings:

Anders did not set down an independent constitutional command that all lawyers, in all proceedings, must follow these particular procedures. Rather, *Anders* established a prophylactic framework that is relevant when, and only when, a litigant has a previously established constitutional right to counsel.

We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks to their convictions, and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further.

Finley, 95 L.Ed.2d at 545 (citation omitted).

The majority concludes that "[t]he State's reliance on [*Finley*] as authority for their contention that state prisoners are not constitutionally entitled to state-supplied attorneys in post-conviction proceedings is misplaced." The majority seeks to distinguish *Finley* because it "was not a meaningful access case, nor did it address the rule enunciated in *Bounds v. Smith*. Most significantly, *Finley* did not involve the death penalty." These distinctions are unpersuasive in light of *Finley*'s clear statement of existing law.

The decision in *Finley* relies heavily on *Ross v. Moffitt*, 417 U.S. 600 (1974). In *Ross*, the Supreme Court held that states are not required to appoint counsel for indigents seeking a writ of certiorari. In the plainest language the decision is grounded upon principles of meaningful access: "We do not believe that it can be said, therefore, that a defendant in respondent's circumstances is denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking [discretionary] review in that court." *Id.* at 615.

The reasoning of *Ross* effectively compelled the result reached in *Finley*:

We think that the analysis that we followed in *Ross* forecloses respondent's constitutional claim. The procedures followed by respondent's habeas counsel fully comported with fundamental fairness. Post-conviction relief is even further removed from the criminal trial than is discretionary direct review. . . . States have no obligation to provide this avenue of relief, and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well.

Nor was the equal protection guarantee of "meaningful access" violated in this case. . . . In *Ross*, we concluded that the defendant's access to the trial record and the appellate briefs and opinions provided sufficient tools for the pro se litigant to gain meaningful access to courts that possess a discretionary power of review. We think that the same conclusion necessarily obtains with respect to post-conviction review.

Finley, 95 L.Ed.2d at 547 (citations omitted). In view of this language, I cannot agree with the majority that *Finley* was not a meaningful access case.

The result in *Finley* was compelled because there was no fundamental right to counsel in the first instance, a factor that was essential to the result reached. It was this, rather than the potentially distinguishable nature of the proceedings (appellate in *Anders* versus trial in *Finley*), which dictated the outcome. We are concerned here with the identical type of proceeding addressed in *Finley*, state habeas corpus, on the heels of a clear and recent statement by the Supreme Court that there is no previously established constitutional right to counsel in state

habeas corpus proceedings.

The majority would additionally distinguish *Finley* because it did not "address the rule enunciated in *Bounds v. Smith*." In *Bounds* the issue was access to "sources of legal knowledge" to prepare meaningful papers, 430 U.S. at 817, and the Court explicitly stated that, for inmates seeking to file post-conviction papers, meaningful access to the courts can be satisfied by either providing adequate law libraries or "adequate assistance from persons trained in the law." *Id.* at 828. The rule of *Bounds* was not addressed in *Finley* because *Bounds* was not intended to imply a broad-based right of counsel as the majority now would have it interpreted. *Hooks v. Wainwright*, 775 F.2d 1433 (11th Cir. 1985), *cert. denied*, 93 L.Ed.2d 287 (1986).

The final basis upon which the majority seeks to distinguish *Finley* is that it did not involve the death penalty and "there is a significant constitutional difference between the death penalty and lesser punishments." *Beck v. Alabama*, 447 U.S. 625, 637 (1980). Therefore, the question is essentially whether on the record before us Plaintiffs constitute an exception to *Finley*, or justify an exceptional application of *Bounds*.

B. The Death Penalty and Virginia Procedures

It is now settled that a state may impose a sentence of death on a defendant convicted of aggravated murder. *Gregg v. Georgia*, 428 U.S. 153 (1976). Since *Gregg*, the Supreme Court has focused on "the procedures by which convicted defendants were selected for the death penalty rather than on the actual punishment inflicted." *Id.* at 179. The "significant constitutional difference" of which the majority speaks is invoked out of context. The "constitutional difference" is, under *Furman v. Georgia*, 408 U.S. 238 (1972) and subsequent decisions, essentially concerned with a sentencing system which must not be arbitrary and capricious in its application; that is, it must not be "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Furman*, 408 U.S. at 309 (Stewart, J., concurring).

Under *Furman*, the sentencing procedures considered were unconstitutional because the death penalty was, by virtue of unguided decision-making, "so wantonly and so freakishly imposed." *Id.* at 310. Thus, the "significant constitutional difference" mandated the establishment of procedures to ensure that circumstances under which individual sentences of death are imposed demonstrate a principled, consistent basis for the fact-

finding decision, and a greater degree of reliability than is required in noncapital sentencing. See *Gregg*, 428 U.S. at 206-07; *Beck v. Alabama*, 447 U.S. at 637-38 ("significant constitutional difference" means that the procedural rules by which a sentence of death is imposed must not diminish the reliability of the sentencing phase of the proceeding, or the guilt phase upon which it is predicated); *Booth v. Maryland*, 482 U.S. ____ , 96 L.Ed.2d 440 (1987) (a state statute that requires consideration of a victim impact statement at the sentencing phase of proceedings creates an unconstitutional risk of a death sentence based upon impermissible or irrelevant considerations); *Ford v. Wainwright*, 477 U.S. 399, 425 (1986) (Powell, J., concurring) ("heightened procedural requirements on capital trials and sentencing proceedings" do not apply in the context of post-sentencing proceedings). This "difference," significant as it is, is not a basis upon which we may begin implying a separate panoply of additional constitutional standards only applicable to collateral challenges in death penalty cases. See *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984) (in both capital and noncapital cases, the same principle governs claims as to effective assistance of counsel).

The Commonwealth of Virginia allows a sentence of death only in cases of aggravated murder. Va. Code Ann. § 18.2-31 (1950, Repl. Vol. 1982 & Supp. 1987). Appeal is automatic from a sentence of death, Va. Code Ann. § 17-110.1A (1950 & Repl. Vol. 1982), and procedural safeguards in excess of that required by the Constitution are provided, such as proportionality review of the sentence imposed in each case. Va. Code Ann. § 17-110.1C.2 (1950 & Repl. Vol. 1982); compare *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984) ("There is thus no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it."). At trial and on the first appeal of right, the defendant is guaranteed the assistance of appointed counsel as required by the Constitution. The Constitution does not provide a right to counsel appointed at state expense in subsequent proceedings, *Ross*, 417 U.S. at 610-11; *Finley*, 95 L.Ed.2d at 545, although a state may as a matter of legislative choice make counsel available to convicted defendants at all stages of judicial review. *Ross*, 417 U.S. at 618. It is significant that the issue of counsel arose in *Finley* solely because *Finley* sought to expand a state policy Pennsylvania has followed

since 1967 which "imposes a mandatory requirement upon the trial court to appoint counsel for an indigent post conviction applicant." *Commonwealth v. Mitchell*, 427 Pa. 395, 235 A.2d 148, 149 (1967); see *Finley*, 95 L.Ed.2d at 548. Similarly, Virginia courts may appoint counsel to assist in state post-conviction proceedings, Va. Code Ann. § 14.1-183 (1950, Repl. Vol. 1985 & Supp. 1987), and are required to appoint counsel in cases involving nonfrivolous claims that require an evidentiary hearing. *Darnell v. Peyton*, 160 S.E.2d 749 (1968). The Virginia procedure is similar to the procedure followed in the federal courts for review of state prisoner petitions under 28 U.S.C.A. § 2254 (West 1977). *Rules Governing Sec. 2254 Cases*, Rule 8(a), (c).

II.

In addition to there being no fundamental right to automatic appointment of counsel, there is no factual basis to support the majority's extension of *Bounds*. Under *Anderson v. Bessemer City*, 470 U.S. 564 (1985), we must accept the district court's findings of fact unless clearly erroneous. The district court's *per se* exception to the standards of *Bounds* is grounded on three premises, none of which are supported by the record: emotional instability of death row inmates as a result of the circumstances of their confinement; the degree of legal complexity unique to death penalty cases; and severe time constraints before execution of sentence.

As to the first premise, the thought of execution may exact an emotional toll. But, the district court's conclusion that death row inmates are rendered incapable of initiating post-conviction petitions is simply not supported by the facts presented. For example, Giarratano has successfully prosecuted other *pro se* actions while on death row. See *Giarratano v. Bass*, 596 F. Supp. 818 (E.D. Va. 1984). And counsel for the inmates conceded during oral argument, "the record does not contain evidence of specific inmates, currently or in the past," where this premise applies.

The record additionally fails to establish that there is a unique legal complexity to death penalty cases. Though the facts and issues of criminal cases are of varying complexity, "the legal standards for constitutionally effective assistance of counsel are constant." *Washington v. Watkins*, 655 F.2d 1346, 1357 (5th Cir.

1981), *cert. denied*, 456 U.S. 949 (1982). Indeed, the same argument of "complexity" could be advanced by other inmates to compel appointment of counsel in noncapital post-conviction murder cases to raise complex issues involving burden-shifting presumptions, or by federal inmates prosecuted under 18 U.S.C.A. § 1963 (West 1984 & Supp. 1987) (RICO) or 21 U.S.C.A. § 848 (West 1981 & Supp. 1987) (Continuing Criminal Enterprise). Further, other than the occasional reference to the "esoteric," "intricate" or "frequently sophisticated" nature of capital cases, the complexity addressed in this record refers to factual complexity and the need for factual "re-investigation." This obscures the fact that the standards of assessing the fairness of a capital prosecution are the same as those for other criminal cases, *Strickland v. Washington*, 466 U.S. 668 (1984), as well as the fact that the purpose of the right to counsel is not to provide a defendant with a private investigator. *United States v. Gouveia*, 467 U.S. 180, 191 (1984). Plaintiffs' witnesses also described two cases purportedly demonstrating the need for complete factual re-investigation, but later conceded that in each instance the habeas corpus petition was actually based on information gained from the transcript of trial. Finally, during oral argument the inmates' counsel agreed that the record did not contain a single example of a case or issue which would provide a basis for the district court's conclusion, nor could one, understandably, be posited by way of illustration.

As to the third premise, the evidence presented does not indicate that Virginia death row inmates are given a limited amount of time to prepare and present their petitions to the courts. Rather, the evidence establishes the contrary. For example, the initiating Plaintiff of the class, Giarratona, has been on death row in Virginia for eight years. The record indicates that a substantial period of time passed between the affirmance of his conviction by the Virginia Supreme Court and the initiation of state or federal habeas corpus proceedings. Another inmate in the class, James Clark, has been on death row since 1979. *Clark v. Commonwealth*, 219 Va. 237, 257 S.E.2d 784 (1979), *cert. denied*, 444 U.S. 1049 (1980). His sentence was vacated on a state habeas corpus petition, based on an initial finding of ineffective assistance of counsel. This finding was reversed by the Supreme Court of Virginia in June, 1984 and the trial court was "directed to fix a date for Clark's execution." *Virginia Dep't of Corrections*

v. Clark, 277 Va. 525, 318 S.E.2d 399, 406 (1984). Testimony of Clark's counsel established that efforts on his behalf are ongoing.

The history of inmates on death row in the Commonwealth of Virginia is consistent with the histories of capital cases throughout the nation. U.S. Dep't of Justice, Bureau of Justice Statistics Bulletin, *Capital Punishment*, 1986 at 1, 8. It is not uncommon to find death penalty cases which have been in litigation for as much as "a full decade, with repetitive and careful reviews by both state and federal courts," as well as by the Supreme Court. *Sullivan v. Wainwright*, 464 U.S. 109, 112 (1983) (application for stay of execution denied); *Songer v. Wainwright*, 469 U.S. 1133 (1985) (Brennan, J., dissenting from denial of petition for certiorari to review sentence of death imposed in 1974). The facts, other reliable data, and common experience all show significant delay rather than a "limited amount of time" in death penalty cases.

III.

Under the majority's analysis Virginia death row inmates are to be automatically provided counsel upon request for preparing state habeas corpus petitions, but are denied this right for preparation of federal habeas petitions. I concur in the majority's conclusion that the Constitution does not require automatic appointment of counsel for the latter, but I disagree with the reasoning. The majority bases its distinction in treatment upon the fact that federal habeas proceedings are analogous to the situation in *Ross* in which a claim for appointed counsel to seek a writ of certiorari was rejected because of availability of appellate briefs, a transcript and state court opinions. The distinction obscures the fact that inmates will also routinely have appellate briefs, a transcript, and state court opinions in mounting a challenge to their conviction in state court. They will also be pursuing claims under liberal pleading and amendment rules that are essentially the same as those followed in the federal courts, and will in fact be provided counsel under essentially the same standard in both the state and federal courts in Virginia.

IV.

In testimony before the district court there was reference to

an agency created by the State of Florida to handle post-conviction capital cases in that state. The district court apparently concluded that this would be appropriate for the Commonwealth of Virginia, and has effectively ordered it to create such an agency. While the Commonwealth of Virginia and other states may elect to adopt this procedure, we have no authority to order it. Federal courts are not empowered to act as "a roving commission to impose...[our] own notions of enlightened policy. . . . [T]he question for decision is not whether we applaud or even whether we personally approve the procedures followed in [this case]. The question is whether those procedures fall below the minimum level the [Constitution] will tolerate." *Spencer v. Texas*, 385 U.S. 554, 569 (1967) (Stewart, J., concurring). The record before us clearly demonstrates that Virginia's procedures more than satisfy constitutional requirements.

I therefore dissent from the majority's rule requiring automatic appointment of counsel upon request for assistance in preparing state habeas corpus petitions. I concur in the majority's decision not to apply this rule with regard to preparation of federal habeas corpus petitions.

Judge Widener, Judge Chapman and Judge Wilkinson have asked to be shown as joining in this separate opinion.

In the United States District Court For the Eastern District of Virginia Richmond Division

JOSEPH M. GIARRATANO, et al.,)
Plaintiffs,)

v.)

EDWARD W. MURRAY, et al.,)
Defendants.)

Civil Action No.
No. 85-0655-R

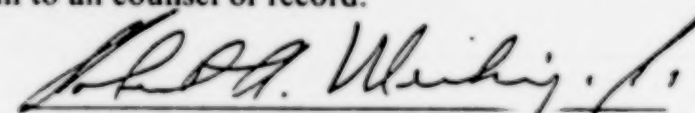
FINAL JUDGMENT ORDER

For the reasons stated in the accompanying Memorandum this day filed, and deeming it just and proper so to do, it is hereby ADJUDGED and ORDERED as follows:

1. The Court declares that indigent Virginia death row inmates are entitled to the appointment of counsel upon request to assist them in pursuing habeas corpus relief in the state courts.
2. The defendants shall develop a system whereby attorneys may be appointed to the death row inmates individually as provided above.
3. The plaintiffs are entitled to their taxable costs and attorneys fees as provided by law.
4. Counsel for the respective parties shall attempt to reach agreement as to counsel fees. Any such agreement shall be without prejudice to defendants' right to contest the right of plaintiffs to recover same.

This action shall, upon agreement or order as to counsel fees stand dismissed with leave to the plaintiffs to petition, for good cause shown, to reopen same for purposes of effectuating the requirements of this decree.

Let the Clerk send copies of this order and the accompanying memorandum to all counsel of record.


UNITED STATES DISTRICT JUDGE

Date DEC 18 1986

**In the United States District Court
For the Eastern District of Virginia
Richmond Division**

**JOSEPH M. GIARRATANO, et al.,)
Plaintiffs,)**

v.)

**EDWARD W. MURRAY, et al.,)
Defendants.)**

**Civil Action No.
No. 85-0655-R**

MEMORANDUM

The plaintiffs in this matter, a class consisting of certain present and future death row inmates, have filed suit pursuant to 42 U.S.C. § 1983 against various officials of the Commonwealth of Virginia. The jurisdiction of this Court is premised on 28 U.S.C. §§ 1331 and 1343. Plaintiffs' contention is that Virginia is constitutionally required to provide them with counsel in post-conviction proceedings such as petitions for writs of certiorari to the United States Supreme Court or habeas corpus.

Background

Plaintiff Giarratano originally brought this action seeking declaratory and injunctive relief with respect to post-conviction assistance of counsel. After permitting other death row inmates to intervene in the suit, the Court granted plaintiffs' motion for class certification. The class consists of

...all persons, now and in the future, sentenced to death in Virginia, whose sentences have been or are subsequently affirmed by the Virginia Supreme Court and who either (1) cannot afford to retain and do not have attorneys to represent them in connection with their post-conviction proceedings, or (2) could not afford to retain and did not have attorneys to represent them in connection with a particular post-conviction proceeding.

There are currently thirty-two inmates on Virginia's Death Row. After full trial on the merits, the Court took the case under

advisement and permitted the parties to file post-trial briefs and other memoranda. Being in receipt of those filings, the Court is now prepared to render its decision.

Merits

Plaintiffs assert a number of federal constitutional grounds to support their claim that they are entitled to post-conviction assistance of counsel. These grounds encompass the equal protection clause, the sixth amendment, the eighth amendment, Article I, and the due process clause of the fourteenth amendment, as well as the right of access to the courts enunciated in *Bounds v. Smith*, 430 U.S. 817 (1977). Although the Court entertains serious doubts as to the viability of many of these theories, it is satisfied that the United States Supreme Court's decision in *Bounds* dictates that the plaintiffs here be granted some form of relief. Consequently, the Court will not address the remaining grounds.

1. *Bounds v. Smith*

In *Bounds*, the Supreme Court considered a section 1983 action filed by prison inmates who sought legal research facilities to assist them in filing habeas corpus petitions and section 1983 claims. The inmates alleged that North Carolina, by failing to provide such facilities, denied access to the courts in violation of the fourteenth amendment.

The Supreme Court agreed, holding that prison authorities are required "to assist inmates in the preparation and filing of meaningful legal papers" by providing prisoners with either adequate law libraries or assistance from legally trained personnel. *Bounds, supra*, 430 U.S. at 828. Rejecting the argument that states could not be obligated to expend funds to effectuate such a right, the Court noted that its previous decisions "have consistently required states to shoulder affirmative obligations to assure all prisoners meaningful access to the courts." *Id.* at 824 (emphasis added).

The Court noted that "meaningful access" is the touchstone. *Id.* at 823. The Court expounded upon this concept by phrasing the issue as "whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental rights to the courts." *Id.* at 825. In concluding that the assistance was required, the Court implicitly rejected the argument that inmates are ill-equipped to use law libraries. The Court noted in passing

that "this Court's experience indicates that *pro se* petitioners are capable of using lawbooks to . . ." raise legitimate claims. *Id.* at 826. This assumption provided the basis for the alternative nature of the required relief: trained legal assistance *or* adequate law libraries.

In the present case, however, the evidence at trial demonstrated that this assumption is invalid with respect to death row prisoners in Virginia. Three considerations underlie this determination.

The first is the limited amount of time death row inmates may have to prepare and present their petitions to the courts. In Virginia, appeal of right lies to the Virginia Supreme Court in all cases in which the death penalty is imposed. Va. Code § 17-110.1. Once the conviction and sentence are affirmed, the sentence may be carried out at any time, provided thirty days has elapsed since the imposition of sentence. Va. Code § 53.1-232. While stays of execution may be secured in appropriate cases to enable a prisoner to prepare a petition for a writ of habeas corpus in the state (and later federal) courts, the result is that a large amount of legal work must be compressed into a limited amount of time. Even assuming that a death row inmate would be intellectually capable of such a task, it is beyond cavil that a prisoner unversed in the law and methods of legal research would need much more time than a trained lawyer to explore his case. See *Williams v. Leeke*, 584 F. 2d 1336, 1339 (4th Cir. 1978).

The second consideration is the complexity and difficulty of the legal work itself. In Virginia, the capital trial is bifurcated, entailing separate proceedings to determine guilt and to set the appropriate punishment. Aside from analyzing the voluminous transcript of the guilt determination phase which not infrequently lasts several days, a great deal of time must be devoted to analyzing the issues of mitigation and aggravation characteristic of the sentencing phase of a capital case.

The third consideration is that at the time the inmate is required to rapidly perform the complex and difficult work necessary to file a timely petition, he is the least capable of doing so. The evidence gives rise to a fair inference that an inmate preparing himself and his family for impending death is incapable of performing the mental functions necessary to adequately pursue his claims.

Based upon these considerations, the Court finds that the

plaintiffs are incapable of effectively using lawbooks to raise their claims. Consequently, the provision of a library does little to satisfy Virginia's obligation to "assist inmates in the preparation and filing of meaningful legal papers" with respect to Virginia death row prisoners. See *Bounds*, *supra*, 430 U.S. at 828. Accordingly, Virginia must fulfill its duty by providing these inmates trained legal assistance. *Id.* Therefore, the Court now turns to an examination of the assistance presently provided by Virginia to determine whether this constitutional requirement is met.

2. Virginia's Current Assistance

Virginia presently provides two forms of trained legal assistance to death row inmates pursuing post-conviction claims. Virginia provides for the appointment of attorneys to the various penal institutions to assist inmates in any matter related to incarceration, see Va. Code § 53.1-40, and Virginia provides for the appointment of counsel under certain circumstances to indigents who have resided in Virginia continuously for six months, see Va. Code § 14.1-183. These provisions will be analyzed in light of the Commonwealth's obligation to provide meaningful access to the courts.

First, pursuant to the Virginia Code, attorneys have been assigned to each institution to assist all inmates in matters related to incarceration. The defendants allege that these institutional attorneys provide the trained legal assistance mandated by *Bounds*. This allegation is not without support. See, e.g., *Williams v. Leeke*, 584 F.2d 1336, 1339 (1978) (Virginia's system of making lawyers regularly available to prisoners for consultation and advice satisfies duty under *Bounds*). With respect to death row prisoners, however, the Court finds that the assistance these attorneys are able to provide is inadequate both in fact and in law.

Currently there are seven institutional attorneys attempting to meet the needs of over 2,000 prisoners. No pretense is made by the defendants in this case that these few attorneys could handle the needs of death row prisoners in addition to providing assistance to other inmates. Although no institutional attorney has helped to prepare the habeas corpus petition of a single death row inmate, the testimony at trial indicated that each attorney could not adequately handle more than one capital case at a time. Moreover, they are not hired to work full time; they split time

between their private practice and their institutional work.

Even if Virginia appointed additional institutional attorneys to service death row inmates, its duty under *Bounds* would not be fulfilled. The scope of assistance these attorneys provide is simply too limited. The evidence indicated that they do not perform factual inquiries of the kind necessitated by death penalty issues. They act only as legal advisors or, to borrow the phrase of one such attorney, as "talking lawbooks." Additionally, they do not sign pleadings or make court appearances. See *Peterson v. Davis*, 421 F. Supp. 1220 (E.D. Va. 1976), *aff'd*, 562 F.2d 48 (4th Cir. 1977).

For death row inmates, more than the sporadic assistance of a "talking lawbook" is required to enable them to file meaningful legal papers. With respect to these plaintiffs, the Court concludes that only the continuous services of an attorney to investigate, research, and present claimed violations of fundamental rights provides them the meaningful access to the courts guaranteed by the Constitution. Having determined that the assistance of institutional attorneys falls short of this requirement, the Court now turns to the second form of assistance provided by Virginia.

As the Court has indicated, *supra*, in addition to institutional attorneys, Virginia courts are authorized to appoint counsel to individual inmates pursuant to the following provision:

Any person, who has been a resident of this State for a continuous period of six months, who, on account of his poverty is unable to pay fees or costs may be allowed by a court to sue or defend a suit therein, without paying fees or costs; whereupon he shall have, from any counsel whom the court may assign him, and from all officers, all needful services and process, without any fees to them therefor, except what may be included in the costs recovered from the opposite party.

Va. Code § 14.1-183.¹ Although such limitations do not appear

¹ The Commonwealth has argued that at least part of the plaintiffs' incentive in bringing this action is not its opposition to appointment of counsel pursuant to this section, but its objection to state court appointment of counsel of a petitioner's choosing. This contention, however, is not supported by the evidence. In at least one instance, in a matter before the Circuit Court of Clarke County, the Commonwealth's counsel contended, unsuccessfully, that the Court had no authority to appoint counsel in a habeas corpus proceeding. Consequently, the availability of such counsel is as much at issue as their efficacy.

on the face of the statute, appointments are made under this provision only after a petition is filed and then only if a non-frivolous claim is raised.² See *Cooper v. Haas*, 210 Va. 279, 170 S.E.2d 5 (1969); *Darnell v. Peyton*, 208 Va. 675, 160 S.E.2d 749 (1968).

Aside from the obvious residency restriction, the timing of the appointment is a fatal defect with respect to the requirements of *Bounds*. Because an inmate must already have filed his petition to have the matter of appointed counsel considered, he would not receive the attorney's assistance in the critical stages of developing his claims. See *Bounds, supra*, 430 U.S. at 828 n. 17. Consequently, attorneys appointed pursuant to this statute are, by reason of the lateness of the appointment, unable to provide all of the required assistance.

To summarize, the pre-petition assistance provided by institutional attorneys is too limited while the post-petition appointment of counsel is untimely. Nor do these provisions viewed together prove adequate. Although ample assistance is provided at trial and on appeal, the requisite aid in preparing the petition itself is absent. The matter of a death row inmate's habeas corpus petition is too important — both to society, which has a compelling interest in insuring that a sentence of death has been constitutionally imposed, as well as to the individual involved — to leave to, what is at best, a patchwork system of assistance. These plaintiffs must have the continuous assistance of counsel in developing their claims.

In the past, Virginia had no need to take affirmative action

² Even assuming that all death row inmates with meritorious claims are capable of filing a petition with at least one non-frivolous ground (an assumption somewhat at odds with the Court's findings), the delay in receiving comprehensive assistance of counsel, as discussed below, may be devastating. Under Virginia law, all claims, the facts of which are known to the petitioner at the time of filing, must be included in that petition or they may not be raised successfully in a subsequent filing. Va. Code § 8.01-654(B)(2). Because federal courts generally may not consider claims that are barred by Virginia procedural rules, see *Whitley v. Bair*, No. 85-4005 (4th Cir. Oct. 6, 1986), those omitted claims would not be considered by a federal forum as well. Finally, the Supreme Court expressly noted that because the "main concern here is 'protecting the ability of an inmate to prepare a petition...,' it is irrelevant that [the state] authorizes expenditures of funds for appointment of counsel in some state post-conviction proceedings for prisoners whose claims survive initial review by the courts." *Bounds, supra*, 430 U.S. at 828 n.17 (citation omitted).

to provide counsel to inmates pursuing post-conviction relief. Attorneys volunteered their services or were recruited to provide pro bono assistance and representation to death row prisoners. Those days are gone. The evidence conclusively establishes that today few — very few — attorneys are willing to voluntarily represent death row inmates in post conviction efforts. One lawyer who did accept such a case testified that he expended in excess of five hundred hours in the preparation and handling of it. He expressed the emotional drain to be such as to preclude his willing acceptance of another such assignment.

The stakes are simply too high for this Court not to grant, at least in part, some relief. In view of the scarcity of competent and willing counsel to assist indigent death row inmates in their exercise of seeking post conviction relief, some relief is both necessary and warranted. The reluctance of competent counsel in reference to these matters requires at a minimum the supervision of a Court in the appointment of competent counsel.

Because Virginia already appoints counsel to those inmates who file habeas corpus petitions containing non-frivolous claims, the relief granted today requires only a slight modification of the current assistance. Virginia need only appoint counsel to death row inmates who request such assistance before the petition is filed in order to comply. This modification should not impose an onerous burden on the Commonwealth. Given the relatively small number of inmates added to Virginia's death row each year, the additional cost to the state should be relatively small.³

Having concluded that state appointed counsel is required, the Court must address the full scope of the necessary assistance.

3. The Scope of the Requisite Assistance

Plaintiffs seek state appointed counsel to prepare and argue petitions for both writs of certiorari to the Supreme Court and writs of habeas corpus in state and federal courts. Consequently, there are two dimensions to the requested relief that must be defined: first, whether the nature of the assistance encompasses petitions for certiorari as well as habeas corpus; and second,

³ While economic factors may be given some consideration by the Court, the cost of protecting a constitutional right cannot in itself be dispositive. See *Bounds, supra*, 430 U.S. at 825.

whether the assistance extends to both state and federal courts.⁴

Whether the right of access extends to assistance in filing petitions for writs of certiorari to the Supreme Court was not addressed in *Bounds*. In *Ross v. Moffitt*, 417 U.S. 600 (1973), however, the Supreme Court did consider whether the due process clause of the fourteenth amendment required appointment of counsel in such cases. In *Moffitt*, the Court first analyzed the line of cases later relied on in *Bounds* to define the right of access. The Court held, however, that appointment of counsel was not required for petitioners seeking discretionary review. Part of *Moffitt's* rationale was that a court addressing a discretionary review petition is not primarily concerned with the correctness of the judgment below, but rather the jurisprudential importance of the issues involved. See *Moffitt, supra*, 417 U.S. at 617.⁵

Pursuant to *Moffitt*, therefore, this Court concludes that assistance in the filing of petitions for writs of certiorari is not required.

The second issue, whether state appointed counsel must assist in both state and federal habeas proceedings, has never been directly addressed by the Supreme Court. *Bounds* and *Moffitt*, however provide ample, albeit conflicting, guidance. Although the question is far from settled, this Court believes that the relief granted should be limited to state post-conviction proceedings.

In *Moffitt*, the Supreme Court, in rejecting a claim that the states must appoint counsel for indigents seeking a writ of certiorari, made two observations that are relevant here. First, the court noted that, in contrast to the situation in which a state itself

⁴ In light of the determination, discussed *infra*, that the reasoning in *Ross v. Moffitt*, 417 U.S. 600 (1973), governs the disposition of these two issues, the Court is of the view that changing the theory under which relief is sought would not alter the analysis. Consequently, the additional grounds raised by the plaintiffs need not be addressed separately from the access theory of *Bounds*.

⁵ Additionally, the Court reasoned that pro se petitioners can present their claims adequately for discretionary review because they already have had counsel for their initial appeals of right and are thus likely to have appellate briefs, trial transcripts, and intermediate court opinions at their disposal. See *Moffitt, supra*, 417 U.S. at 615-18; *Bounds, supra*, 430 U.S. at 827. The *Moffitt* court also indicated a difficulty in finding constitutionally required state-appointed counsel for federal statutorily created review. *Moffitt, supra*, 417 U.S. at 617-18.

provides an avenue of review, it would be anomalous to require a state to provide counsel to one seeking federal statutorily created relief.⁶ *Moffitt, supra*, 417 U.S. at 617-18. As with the writ of certiorari, the right to seek federal habeas corpus relief is not granted by the state, but rather by Congress. See 28 U.S.C. § 2254.⁷

Second, in considering a petition for a writ of certiorari, the Court observed that it would have available the appellate brief prepared by counsel, a transcript, and the opinion of any state courts that had addressed the issues. *Moffitt, supra*, 417 U.S. at 616. Similarly, in light of the exhaustion requirement,⁸ a federal court considering a petition for habeas corpus would likewise have the brief of counsel, a transcript, and opinions from the Virginia courts that have considered the matters. In sum, the reasoning in *Moffitt* indicates that relief here should be limited to appointment of counsel in state habeas proceedings.

The result in *Bounds*, however, conflicts with this reasoning. In *Bounds*, the court did not distinguish between federal and state habeas proceedings in ordering the creation of libraries or assistance programs to aid inmates in filing petitions. The Court, however, did not expressly address the instant issue or the concern expressed in *Moffitt*.

On the basis of the teachings of *Moffitt, supra*, this Court is of the view that relief should be limited to state habeas proceedings. Such a legal conclusion does not, however, signify that an indigent death row petitioner will be denied the assistance of counsel in federal court. Pursuant to 28 U.S.C. § 1915, the federal courts are empowered to appoint counsel under certain circum-

⁶ The Supreme Court noted that "the argument . . . that the state having once created a right of appeal must give all persons an equal opportunity to enjoy the right, is by its terms inapplicable." *Moffitt, supra*, 417 U.S. at 617 (referring to *Griffin v. Illinois*, 351 U.S. 12 (1956) and *Douglas v. California*, 372 U.S. 353 (1963)).

⁷ Although federal habeas corpus relief is provided for by statute, it has a constitutional dimension as well. As noted by the late Judge Tamm in *Palmore v. Superior Court of the District of Columbia*, 515 F.2d 1294, 1301 (1975), *vacated and remanded*, 429 U.S. 915 (1976), "[h]abeas corpus holds a unique position in our constitutional scheme. It is nowhere directly constitutionally endowed, but the Constitution, through the suspension clause, protects against its interference."

⁸ See 28 U.S.C. § 2254(b).

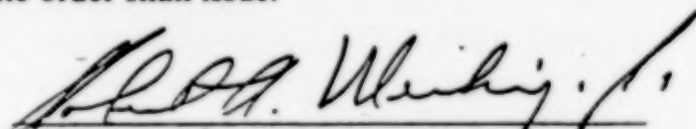
stances to indigent litigants before them.⁹ Consequently, a death row inmate may continue to receive legal assistance in pursuing his claims in federal court.

As a final matter, the evidence at trial indicated that the substitution of counsel at the doors of the federal courthouse would have catastrophic effects on the ability of the new attorney to adequately prepare and present an inmate's claims in the short time provided. These concerns need not be addressed at present, however, for the Court envisions little difficulty in the creation of a system of representation in which the same attorney may provide representation in both state and federal courts, but is compensated by different sources for efforts in each.

Conclusion

For the reasons stated above, the Court will order Virginia to develop a program whereby counsel is appointed upon request to death row inmates who cannot afford to retain and do not have an attorney to represent them in connection with pursuing habeas corpus relief in the state courts.

An appropriate order shall issue.


UNITED STATES DISTRICT JUDGE

Date DEC 18 1986

⁹ Such appointment would come only after the inmate has filed his § 2254 petition. Cf. *Gordon v. Leeke*, 574 F.2d 1147, 1153, cert. denied, 439 U.S. 970 (1978) (district court should appoint counsel to assist a *pro se* litigant who raises a colorable claim but lacks the capacity to present it).

NO. 88-411

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1988

EDWARD W. MURRAY, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS, et al.,
Petitioners,

v.

JOSEPH M. GIARRATANO, et al.,
Respondents.

**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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QUESTION PRESENTED

1. Did the Fourth Circuit, sitting *en banc*, err in holding (a) that the District Court's findings of fact, supporting its conclusion that Virginia's Death Row inmates are deprived of meaningful access to the courts to pursue state habeas corpus remedies, were not clearly erroneous, and (b) that the District Court's remedy of requiring that legal representation be provided prior to, rather than following, the filing of state habeas corpus petitions did not constitute an abuse of discretion?

LIST OF PARTIES

The plaintiffs in the proceedings below included Joseph M. Giarratano, Johnny Watkins, Jr., Richard T. Boggs and a class certified by the District Court, comprised of

all persons, now and in the future, sentenced to death in Virginia, whose sentences have been or are subsequently affirmed by the Virginia Supreme Court and who either (1) cannot afford to retain and do not have attorneys to represent them in connection with their post-conviction proceedings, or (2) could not afford to retain and did not have attorneys to represent them in connection with a particular post-conviction proceeding.

847 F.2d 1118, 1120 (4th Cir. 1988). The description of the class in the Petition (at p. 2) is incomplete.

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STATEMENT OF THE CASE

This is a particularly fact-bound case limited to the unique circumstances of Death Row prisoners pursuing post-conviction proceedings in Virginia. The United States District Court for the Eastern District of Virginia (Hon. Robert R. Merhige), meticulously following the directions that this Court enunciated in *Bounds v. Smith*, 430 U.S. 817 (1977), found as a fact that Respondents' distinctive situation severely disables them from obtaining access to the courts in a timely and meaningful manner. Accordingly, the District Court determined that Virginia should modify its existing *Bounds* remedy to provide Death Row inmates with legal representation prior to, rather than following, their filing of state habeas corpus petitions. The court noted that its decision "requires only a slight modification of the current assistance." 668 F. Supp. at 515.

The Fourth Circuit affirmed, *en banc*, holding that the District Court's findings were not clearly erroneous and that its limited remedy did not constitute an abuse of discretion. The Fourth Circuit's decision does not conflict with any decision of this Court, or the decision of any other Court of Appeals: The Fourth Circuit is the first federal appellate court to examine the access to post-conviction remedies that any state provides for its Death Row prisoners.

I. THE CRISIS IN VIRGINIA

This case arose when Virginia attempted to execute an unrepresented, mentally retarded Death Row inmate who, because he could not afford a lawyer, was unable to institute state habeas corpus proceedings. (Tr. 198-200)¹ Earl Washington, who had just completed the direct review of his death sentence, asked a Virginia Circuit Court judge to appoint a lawyer to help him file a

¹ "Tr. ____" refers to the transcript of the two-day trial before the Honorable Robert R. Merhige; "Px ____" or "Dx ____" refers to exhibits offered at this trial.

state habeas petition. The judge denied Mr. Washington's motion and, in the same order, scheduled his execution. (Px 22; Tr. 199)

Mr. Washington's only hope for living to begin his post-conviction proceedings lay in somehow finding (and convincing) an attorney to take his case without pay. In Virginia, a Death Row inmate searches for volunteer counsel by asking fellow Death Row inmate Joseph Giarratano to contact Marie Deans of the Virginia Coalition on Jails and Prisons. (Tr. 261-63) Ms. Deans, the Executive Director and sole staff person of the Coalition, formed this organization in 1983 in response to the crisis that had developed in Virginia Death Row representation: "Nobody in Virginia seemed to know who was [on Death Row] and who had attorneys and where they would get attorneys if they needed attorneys." (Tr. 186) Ms. Deans therefore began to monitor Virginia's Death Row, and attempted to find lawyers for the inmates who needed them.

The Commonwealth itself has come to rely exclusively on Ms. Deans and her recruiting efforts as Virginia's "system" of legal assistance for Death Row inmates. James Kulp, Virginia's Senior Assistant Attorney General and "Coordinator of all Capital Litigation in the Commonwealth," explained:

Q. Now, what happens after a certiorari lawyer who has been doing this case for free tells you he is not able to handle it anymore? What do you do?

A. In the past I have been calling Marie Deans. Or she has called me, one or the other.

Q. What do you tell her?

A. I said, are we going to have somebody represent this person? And she says, yes, we are looking. And at times she has difficulty, but she has had people and we have dealt with them . . .

(Tr. 449-50; *see also* Tr. 319, 320, 321, 344, 346, 419, 420, 442, 449-50) Since late 1984, however, Ms. Deans has experienced increasing difficulty in locating volunteers to represent Virginia's indigent Death Row inmates:

Where I had been recruiting attorneys five days a week, from 9:00 to 5:00 or 6:00, I began to have to recruit attorneys seven days a week for 12 or 14 hours a day. We were coming down to deadlines with no attorneys. The attorneys were more and more resistant to taking the cases, and it just seemed like we had sort of moved through Virginia and taken that for whatever was there. I started having to go further and further afield. I went from Virginia all the way up the East Coast looking for attorneys.

(Tr. 191; *see also* Tr. 94, 263-64, 325; Px 14)²

When Ms. Deans began looking for a lawyer for Mr. Washington (while simultaneously searching for lawyers for four other Death Row inmates), she found that the supply of volunteer lawyers was exhausted:

I contacted over a hundred attorneys. I contacted the D.C. pro bono bar, the Legal Defense Fund, the Southern Prisoners Defense Committee, attorneys in Georgia, if you believe that. Attorneys in South Carolina, attorneys in North Carolina. All the way up through New York. I went to large firms, I went to anybody.

(Tr. 193-94; Px 1) Nobody would take Mr. Washington's case.

Other people and organizations, including the N.A.A.C.P. Legal Defense Fund and the American Civil Liberties Union, began scrambling to find someone to represent Mr. Washington. Eventually, even United States District Judge Robert R. Merhige, in response to a letter from Death Row, began soliciting attorneys. (Tr. 36-37, 270; Px 14, 21)

Finally, only a week before Mr. Washington's scheduled date of execution, counsel in this action stepped in and prepared an

² The burden of undertaking this representation on a volunteer basis is extraordinary. Capital post-conviction cases are a tremendous financial drain on attorneys, both because of the hundreds of hours of time involved and the out-of-pocket expenses. (Tr. 47, 88-89, 142-44, 156-57, 162, 176, 185, 189-90; Px 3)

emergency petition for writ of habeas corpus. A few days before Mr. Washington was to be electrocuted, he obtained a stay of execution. (Tr. 198-99, 204)

Mr. Kulp admitted at the trial below that, even though Virginia was aware that Mr. Washington was desperately but unsuccessfully seeking a lawyer to help him begin habeas proceedings, the Commonwealth would have electrocuted him absent a stay:

Q. If you didn't hear from Mr. Washington, you . . . were going [to] execute him whether he had a lawyer or not, isn't that correct?

A. The order would have been carried out I am sure.

Q. The order of execution?

A. That is correct.

(Tr. 443; see also Tr. 450-51)

The representatives of the plaintiff class were similarly unable to obtain legal representation. At the time of the trial in this action, one year after the Virginia Supreme Court had affirmed the conviction and death sentence of Plaintiff Richard A. Boggs, Mr. Boggs still had no lawyer to help him begin state habeas corpus proceedings. (Tr. 202) Plaintiff Johnny Watkins, Jr., after a full year in the same predicament, had only recently obtained a volunteer lawyer. (Tr. 119, 197-98) Both men had previously searched for four months for volunteer counsel to prepare petitions for writ of certiorari to this Court. (Tr. 197, 202) Had it not been for the pendency of this lawsuit, they too would likely have faced execution before they could commence post-conviction proceedings. As Mr. Kulp testified, "[i]f Mrs. Deans calls and says we don't have any counsel, we can't get any counsel . . . we are obviously not going to sit there from now to doomsday waiting on somebody to do something." (Tr. 450-51)

The circumstances of Messrs. Washington, Boggs, and Watkins typify those of indigent inmates on Virginia's Death Row. (Tr. 191-202; Px 1) It has taken Ms. Deans more than a year to find counsel for some inmates. (Tr. 193-204; Px 1) Other inmates, such as Wilbert Evans, obtained volunteer lawyers only days before scheduled dates of execution. (Tr. 134-135) Ms. Deans was

unable to find a lawyer at all to prepare two of three petitions for certiorari for Syvasky Poyner (Tr. 264), and James Briley completely lost the right to petition this Court for writ of certiorari for the same reason. (Tr. 35) In addition, at the time of trial, there were five men who would shortly need post-conviction counsel. Ms. Deans had no idea how she would find them lawyers. (Tr. 204-05)

These Death Row inmates want to begin post-conviction proceedings, and they need lawyers to help them. Such proceedings are extraordinarily important because more than half of those Death Row inmates who do get into court (by virtue of legal representation) succeed in having their death sentences vacated. (Tr. 11)³ Yet at the point when the inmate should begin these vital proceedings -- and when he is suddenly, and for the first time, placed in jeopardy of immediate execution -- the Commonwealth withdraws representation. He is left to proceed *pro se*.

II. THE PROCEEDINGS BELOW

At trial, the District Court heard testimony from 17 witnesses, including two who qualified as experts on capital post-conviction proceedings, four other attorneys who had represented Virginia Death Row inmates in such proceedings, four attorneys responsible for counseling inmates in Virginia prisons, and two Virginia Death Row inmates. Based on this evidence, the District Court found that Virginia's Death Row inmates are incapable of using prison law libraries to pursue post-conviction remedies; that the system of legal assistance provided to Death Row inmates by Virginia is inadequate; and that volunteer attorneys are no longer available to carry the Commonwealth's burden.

³ In concurring in the denial of Plaintiff Johnny Watkins, Jr.'s petition for writ of certiorari on direct appeal, Justice Stevens acknowledged that there had been a clear constitutional violation at Mr. Watkins's murder trial, but decided to "allow the error to be corrected in collateral proceedings." *Watkins v. Virginia*, 106 S.Ct. 1503 (1986).

A. Death Row Inmates Are Incapable of Proceeding *Pro Se* in Post-Conviction Proceedings

The District Court first analyzed the capability of Death Row inmates to use the Virginia prison law libraries to pursue *pro se* their post-conviction remedies in Virginia courts meaningfully and effectively. It found, from uncontradicted testimony, that they cannot. This finding was based on the interplay of three specific factors: (1) "the complexity and difficulty of the legal work itself"; (2) "the limited amount of time death row inmates may have to prepare and present their petitions to the courts"; and (3) the fact that "an inmate preparing himself and his family for impending death is incapable of performing the mental functions necessary to adequately pursue his claims." 668 F. Supp. at 513. These findings are well-founded in the record and in common sense.

One of Respondents' expert witnesses, an attorney who has represented 60 to 80 Death Row inmates and significantly assisted in the representation of 200 to 300 others (Tr. 10), testified that he had never known a Death Row inmate who was capable of representing himself. (Tr. 31-32) He explained:

In matters of legal research, capital cases are particularly difficult, and although some clients are bright and could understand one stage of a proceeding sometimes, and one facet of the criminal law, very few can integrate the procedural and substantive and the constitutional questions that are needed in order to make accurate assessments of what issues have merit and what don't.

It is not the case that because one can file one Fourth Amendment claim or one Fifth Amendment confession claim after a great deal of work if one is a bright, unusually bright criminal defendant that one can integrate that [claim] into a series of 8 or 10 or 13 constitutional claims that may need to be presented. In other words, I guess what I am saying is [in] theory there are some Death Row inmates who can articulate one or two constitutional claims if given proper access to legal

resources. I have never met one who could adequately prepare an entire petition that lays out a series of claims.

(Tr. 32-33, 59) No contrary evidence was offered.

Few of Virginia's Death Row inmates have any understanding of their rights and remedies following direct appeal. (Tr. 115-18, 262-63, 264, 267-68, 280) Plaintiff Johnny Watkins described his own perplexity:

Q. Do you know whether your case went to any other courts after the Virginia Supreme Court?

A. I think it went up, it went to another court, but I don't know exactly which one.

Q. Do you know what court you go to next?

A. No.

Q. Do you know what step you take next to appeal your case?

A. No.

(Tr. 116-17)⁴ Nor do these inmates know how to conduct legal research (Tr. 120, 130-31, 267-68); the vast array of substantive legal issues is beyond their grasp. (Tr. 32-33, 59, 266, 275)⁵ Moreover, as the law in capital cases is rapidly developing, inmates are not only charged with staying current (Tr. 28, 60), but with anticipating changes in the law. (Tr. 21) A single procedural or substantive mistake by a *pro se* inmate, however, could irreparably

⁴ As one of Respondents' expert witnesses testified, a problem unique to capital cases is the likelihood that, under the pressure of an impending date of execution, an inmate may be litigating in two or even three courts simultaneously. (Tr. 29)

⁵ At the one Virginia Death Row institution -- out of three -- where Death Row inmates are permitted to enter the library, they can do so only two times a week (assuming no other Death Row inmates wish to do research) for a maximum of two and one-half hours a visit. (Tr. 398) The prison makes little accommodation for emergencies. (Px 26, 27) At the two other prisons housing Death Row inmates (including the State Penitentiary, where they are confined the final two weeks before their execution), they are *not* permitted to visit the library *at all*. (Dx 3, 5, 11)

prejudice his rights in a way that cannot be repaired later by counsel.⁶

As a second consideration underlying Death Row inmates' inability to litigate *pro se*, the District Court found that they must conduct this complex and sophisticated litigation under severe time constraints. 668 F. Supp. at 513. (See also Tr. 22, 31, 86-87, 170-76) Once an execution date is set -- which, in Virginia, can happen "at any time" after affirmance by the Virginia Supreme Court -- the inmate must pursue *all* of his post-conviction remedies in the period prior to that date. 668 F. Supp. at 513.

For example, Death Row inmate Richard Whitley received an execution date immediately after the Virginia Supreme Court rejected his petition for appeal from a denial of state habeas relief. (Tr. 168-71) His volunteer attorney, Timothy Kaine, had one month to assert his claims in federal court. The habeas petition was presented to a district court 21 days before the scheduled execution date. Fifteen days later, and six days before the execution date, the district court dismissed the habeas petition and denied the motions for a stay and for a certificate of probable cause. (Tr. 173-74) Mr. Kaine then flew to Abingdon, Virginia to obtain a certificate of probable cause and stay of execution from a Fourth Circuit judge, accomplishing this four days before Mr. Whitley's scheduled date of execution, after 140 hours of work in a 10-day period. (Tr. 175-76)

Respondents' expert testified, again without contradiction, that the *Whitley* schedule was too often the rule:

I know plenty of lawyers that have been involved with an execution date facing them and in a 30 or 45 day period before execution who have been unable to get

⁶ As pointed out by the Fourth Circuit (847 F.2d at 1120 n.4), an attorney's assistance is "particularly critical in Virginia." Under Virginia law, if an inmate files a petition *pro se* and omits -- through lack of knowledge of the law -- allegations that he could have included, he may be barred from including these allegations in successive petitions, no matter how meritorious his claims may be. Va. Code § 8.01-654(B)(2). Under the doctrine of procedural default, he may then be barred from asserting these claims in federal court. See *Whitley v. Bair*, 802 F.2d 1487 (4th Cir. 1986), cert. denied, 107 S.Ct. 1618 (1987).

stays in court after court. What that typically involves is 30 days of virtual around the clock work. A lawyer will take a case Monday May first and at [the] end of May will have done no other work except litigate in five or six courts.

(Tr. 31) Likewise, attorney Jonathan Shapiro described his frantic struggle to file a first state habeas petition after he took on Wilbert Evans's case (because no other lawyer could be found) just days before Mr. Evans's scheduled execution. (Tr. 134-36) Similarly, Marie Deans related the hectic, night and day efforts counsel devoted for Mr. Washington. (Tr. 198-99) A Death Row inmate could hardly be expected to do so much for himself in so little time.⁷

Finally, as a third consideration, the District Court found that even if Death Row inmates had the legal skills and time to pursue post-conviction remedies *pro se*, their mental and emotional states would nevertheless render them incapable of proceeding on their own. 668 F. Supp. at 513. As one of Respondents' experts explained, based on 10 years of experience:

Finally, and I think that is perhaps unique to capital inmates in my experience, the prospect of facing death or having to come to terms with an execution date or a date certain for one's demise is [a] seriously enough involving and challenging emotional and personal crisis that even an inmate who was a law graduate and who otherwise had the capability to do legal and factual research, probably does not have the detachment and dispassion to litigate under those circumstances. I have had lots of clients in those last 60 day time periods, and what they are forced to do is to prepare themselves mentally and spiritually and emotionally to deal with their

⁷ The fact that some inmates have managed to survive on Death Row for an extended period of time is attributable solely to the fact that these inmates *did* have lawyers. Had Petitioners had their way, Mr. Washington would have perished less than four months after certiorari was denied on his direct appeal. In all likelihood, class representatives Johnny Watkins and Richard Boggs would not have lived much longer. (See Tr. 449-51)

family and their children, all of whom see them as about to die. And that is a full time job.

And very few of them, I think, even have the emotional resources to talk with you meaningfully at that point about their case. Much less to take it over.

(Tr. 33-34)

Other witnesses testified, also without contradiction, about individual inmates whose mental and psychological conditions prevented them from assisting their attorneys -- much less proceeding *pro se*. Attorney Robert Hall said of his client, James Clark:

A. Clark was sometimes cooperative and sometimes not. It was difficult to tell which of the Clark's you were dealing with from day-to-day.

Q. Did Mr. Clark ever indicate that he thought this evidence was important?

A. Mr. Clark was virtually unaware in his present mind of most of this.

(Tr. 77, 84) Death Row inmate Joseph Giarratano, testifying from a particularly close perspective, described two fellow Death Row inmates: "Mr. Ciosa was in a strip cell on suicide watch. There was no way he could help himself. He was highly sedated with hypotrophic drugs." (Tr. 267) As for Death Row inmate Syvasky Poyner:

A. Mr. Poyner didn't even know where he was at.

Q. What do you mean by that?

A. He doesn't understand what is happening or that he is going to be killed.

(Tr. 264) No contrary evidence was offered.

From this and other unrefuted testimony, the District Court found that "the plaintiffs are incapable of effectively using law-books to raise their claims. Consequently, the provision of a library does little to satisfy Virginia's obligation to 'assist inmates in the preparation and filing of meaningful legal papers' with

respect to Virginia death row prisoners. *See Bounds, supra*, 430 U.S. at 828, 97 S.Ct. at 1498. Accordingly, Virginia must fulfill its duty by providing these inmates trained legal assistance. *Id.*" 668 F. Supp. at 513.

B. The Commonwealth's Provision of Attorneys for Post-Conviction Proceedings Is Inadequate

Having found that Virginia's Death Row inmates could not adequately represent themselves, Judge Merhige turned to the question whether Virginia provides adequate legal assistance for post-conviction proceedings. He found the two alleged forms of such assistance -- part-time, counseling lawyers appointed to Virginia prisons under Va. Code § 53.1-40, and the possible availability of court-appointed attorneys under Va. Code § 14.1-183 -- insufficient to meet the constitutional requirements of *Bounds v. Smith*.

1. The Institutional Attorneys Do Not, and Cannot, Provide Legal Representation in Capital Post-Conviction Cases

As the District Court found: "The scope of assistance these attorneys provide is simply too limited. The evidence indicated that they do not perform factual inquiries of the kind necessitated by death penalty issues. They act only as legal advisors or, to borrow the phrase of one such attorney, as 'talking law books'." 668 F. Supp. at 514.

These attorneys -- who consider themselves to be no more than adjuncts of prison law libraries -- do not appear in court; do not serve as counsel of record; do not perform factual investigations; do not devote more than a few hours to any one inmate; and do not necessarily draft pleadings. (Tr. 224, 227, 301, 330, 356, 376, 387; Px 12, Dx 3 at 2) Seven such lawyers, all of whom additionally have full-time private practices, are responsible for advising almost 2,000 inmates. (Tr. 220-21, 223, 231-32, 297, 304-06, 311-12, 314, 364-365, 371, 393-94)

Not one of these lawyers has ever drafted a petition for writ of certiorari or a petition for writ of habeas corpus on behalf of a Death Row inmate. (Tr. 227, 229, 307-08, 319, 386-87) Indeed, requests for such legal assistance by Death Row inmates (including Syvasky Poyner, Johnny Watkins, Joseph Giarratano, and Richard Boggs) have been firmly -- and uniformly -- rejected. (Tr. 120-23, 262, 264-65, 267-69, 270, 272-73, 277-78, 341-48, 353, 457; Px 25)

Judge Merhige correctly assessed the possibility that the assistance offered by institutional attorneys could provide Death Row inmates with access to the courts for post-conviction proceedings:

For death row inmates, more than the sporadic assistance of a "talking lawbook" is required to enable them to file meaningful legal papers. With respect to these plaintiffs, the Court concludes that only the continuous services of an attorney to investigate, research, and present claimed violations of fundamental rights provides them the meaningful access to the courts guaranteed by the Constitution.

668 F. Supp at 514.

2. The Possibility of Obtaining Court-Appointed Counsel is Insufficient to Secure the Rights of Death Row Inmates

The District Court, "[h]aving determined that the assistance of institutional attorneys falls short of [the constitutional] requirement" 668 F. Supp at 514, considered the likelihood of securing court-appointed attorneys pursuant to Va. Code § 14.1-183. After analyzing the statute and its operation, Judge Merhige found:

Aside from the obvious residency restriction, the timing of the appointment is a fatal defect with respect to the requirements of *Bounds*. Because an inmate must already have filed his petition to have the matter of appointed counsel considered, he would not receive the attorney's assistance in the critical stages of developing

his claims. See *Bounds*, *supra*, 430 U.S. at 828 n.17, 97 S.Ct. at 1498 n.17. Consequently, attorneys appointed pursuant to this statute are, by reason of the lateness of the appointment, unable to provide all of the required assistance.

668 F. Supp. at 515.

The District Court's finding is based on the fact that, in order to qualify for appointment of Virginia state habeas counsel, the Death Row inmate must: (1) prepare and file a petition, (2) survive a motion to dismiss, and (3) convince a court that the issues raised by the petition are "substantial" and require an evidentiary hearing. *Darnell v. Peyton*, 208 Va. 675, 160 S.E.2d 749 (1968). Indeed, the Senior Assistant Attorney General so testified. (Tr. 438)

Respondents' conjecture that counsel could theoretically be appointed prior to the evidentiary hearing is contrary to the evidence offered at trial. The record reveals six cases -- including one of the two instances Petitioners cite where counsel was in fact appointed -- in which the Commonwealth *opposed* appointment on grounds that it was contrary to Virginia law.⁸ (Tr. 88, 143, 154, 248-49, 251-52; Px 33, 35) The Commonwealth has been quite successful in arguing that its adversaries should not have lawyers: The record provides evidence of Virginia state courts denying motions for appointment of post-conviction counsel at least three times (Tr. 91-92, 248, 251; Px 86), and Virginia federal courts also denying appointment three times. (Tr. 252)⁹ The possibility that

⁸ Petitioners cite two instances (Px 34, Dx 17) in which Virginia Circuit Courts appointed lawyers to represent Death Row inmates prior to the evidentiary hearing. In one of these examples, however, counsel was not in fact appointed until after the petition was filed. (Px 34, 35) In any event, these purported examples serve only to underscore the inadequacies of what the Commonwealth offers. In fact, the Death Row inmates already had *volunteer* counsel; the courts merely appointed the volunteer lawyers. (Tr. 104, 248-50; Px 35) This provides little solace to an unrepresented inmate who, because he cannot find a volunteer lawyer in the first place, has no counsel who will seek appointment.

⁹ As the Virginia Supreme Court has confirmed, appointment under § 14.1-183 is at all times wholly discretionary. *Darnell*, 160 S.E.2d at 750; *Howard v. War-*

a Death Row inmate may, through defeating the Commonwealth in a litigated motion, *win* himself an attorney can seem only a cruel joke to inmates such as Messrs. Washington, Clark, Poyner, and Closa, who could never have sustained their own cases long enough to earn themselves lawyers.

Most importantly, as this Court held in *Bounds*, the possibility of appointment of counsel under this statute is simply irrelevant. "Since our main concern here is 'protecting the ability of an inmate to prepare a petition or complaint,' *Wolff v. McDonnell*, 418 U.S. at 576, it is irrelevant that [the state] authorizes the expenditure of funds for appointment of counsel in some state post-conviction proceedings for prisoners whose claims survive initial review by the courts." *Bounds*, 430 U.S. at 828 n.17.

C. Volunteer Attorneys Are Not Available in Virginia To Meet the Needs of Death Row Inmates

Having found that Virginia lacks a system for providing counsel to indigent Death Row inmates, Judge Merhige considered whether volunteer lawyers are available to assume post-conviction representation. He found that they are not:

The evidence conclusively establishes that today few -- very few -- attorneys are willing to voluntarily represent death row inmates in post conviction efforts. . . . In view of the scarcity of competent and willing counsel to assist indigent death row inmates in their exercise of seeking post conviction relief, some relief is both necessary and warranted.

668 F. Supp. at 515.

The consequence is that inmates are now going without post-conviction lawyers for extended periods of time. The effect of such delays, Judge Merhige found, "may be devastating." 668 F. Supp. at 515 n.2. And, as previously outlined, the volunteer system completely failed with regard to Earl Washington.

den, Buckingham Correctional Center, 232 Va. 16, 348 S.E.2d 211, 213 (1986). Thus, due to its untimely and unsure application, this system is a far cry from providing assurance of meaningful access to Death Row inmates.

Thus, if Virginia's Death Row inmates are left to rely solely on volunteer counsel, there can be no meaningful access -- and no post-conviction review -- for them.

In sum, there is no system whatsoever in place in Virginia that assures indigent Death Row inmates meaningful access to the courts for state post-conviction proceedings. Relief in the form ordered by Judge Merhige was thus wholly warranted:

The matter of a death row inmate's habeas corpus petition is too important -- both to society, which has a compelling interest in insuring that a sentence of death has been constitutionally imposed, as well as to the individual involved -- to leave to, what is at best, a patchwork system of assistance. These plaintiffs must have the continuous assistance of counsel in developing their claims.

668 F. Supp. at 515.

REASONS FOR DENYING THE WRIT

This case, which presents none of the considerations customarily required to warrant Supreme Court review, is a particularly inappropriate candidate for the exercise of this Court's certiorari jurisdiction. The Fourth Circuit's *en banc* decision conflicts neither with any decision of this Court nor with the decision of any other Court of Appeals. Although the courts below painstakingly applied the principles and reasoning of *Bounds* and its progeny, the Fourth Circuit is the *first* federal appellate court to consider the access to the courts that any state provides its Death Row inmates for post-conviction proceedings. Moreover, this case falls squarely within the "two-court rule": Underlying all the arguments in the Petition is the objective that this Court review and overturn explicit findings of fact adopted by the District Court and fully endorsed by the Fourth Circuit. Finally, Petitioners ask this Court to exercise its certiorari jurisdiction to make a broad *per*

se ruling that counsel may *never* be required in any situation as a remedy for a constitutional violation.

It is the Petition, not the decisions below, that is based on sweeping generalizations and across-the-board assumptions; it is Petitioners, not Respondents, who advocate a new, nationwide, *per se* constitutional rule. The writ should be denied.

I. THIS CASE RAISES NO ISSUE RIPE FOR SUPREME COURT CONSIDERATION

Petitioners urge that the Fourth Circuit's decision -- which concerns the lack of legal assistance provided to *Virginia's* Death Row inmates in light of *Virginia's* willingness to execute these unrepresented inmates -- is such an "unprecedented intrusion" into all states' post-conviction proceedings that it warrants this Court's review. (Pet. at 14) Yet, although provision of representation is of life or death significance to the Death Row inmates, it is by no means apparent that the Fourth Circuit's decision will have the "radical" effect throughout the country -- or even in Virginia -- that Petitioners predict. (*See id.*)

The District Court found, based on the evidence offered at trial, that provision of lawyers prior to, rather than following, the filing of a state habeas corpus petition requires "only a slight modification of the current assistance." 668 F. Supp. at 515. The court, in its Final Judgment Order, gave Petitioners free rein to "develop a system" to implement the relief ordered. 668 F. Supp. at 517. Petitioners have been free to address any "sweeping generalization" or "across-the-board assumption" regarding the application of the order in this implementation stage. (*See* Pet. at 9) Yet, Petitioners have made *no* attempt to develop *any* type of system. Thus, Petitioners have failed to demonstrate the actual, as opposed to hypothetical, impact of the Fourth Circuit's decision on Virginia.

Petitioners' prophecy regarding the decision's national impact is equally speculative. Virginia is exceptional in its adamant refusal to address Death Row inmates' lack of representation and in its readiness to execute the unrepresented. The federal govern-

ment, other states, and state and federal courts have, unlike Virginia, acknowledged that Death Row inmates must receive the assistance of lawyers in order to have access to post-conviction proceedings.

Congress and the federal judiciary have begun to address the problem through a variety of measures. Both the Senate, in S.2455, and the House of Representatives, in H.R.5210, recently passed bills providing for *mandatory* appointment of counsel for state Death Row inmates pursuing federal habeas corpus remedies. The House has also provided for the automatic appointment of counsel for petitions for writ of certiorari in federal capital prosecutions. Similarly, federal district courts are beginning to adopt rules providing for the *mandatory* pre-petition appointment of counsel to state Death Row inmates pursuing federal habeas corpus relief. *See* General Order No. 30 of the Northern District of California (adopted May 1988); Local Rule No. 191 of the Eastern District of California (adopted June 1988). In addition, the Judicial Conference has approved the federal funding of resource centers "solely for the purpose of providing *representation*, assistance, information, and appropriate other services in connection with federal death penalty habeas corpus cases" brought by state Death Row inmates. *Guidelines for the Administration of the Criminal Justice Act* (18 U.S.C. 3006A) App. D-2 (May 20, 1988)(emphasis added). At least three such resource centers -- in Tennessee, Georgia, and Louisiana -- have already been funded. Finally, this Court has recently appointed former Justice Lewis Powell to head a commission to study capital post-conviction proceedings.

States having the death penalty, other than Virginia, have likewise begun to address the question. Florida, with one of the largest Death Rows in the country, has established by statute the Office of the Capital Collateral Representative to provide actual representation in *all* capital post-conviction proceedings. Fla. Stat. Ann. § 27.7001. Oklahoma and Indiana have comparable offices. *See* Okla. Stat. Ann. tit. 22, §§ 1089, 1360. This past summer, the North Carolina General Assembly appropriated \$191,505 for the operation of a Death Penalty Resource Center

providing assistance in post-conviction proceedings. 1987 N.C. Sess. Laws (Reg. Sess. 1988) ch. 1086, Sec. 109. In addition, the legislatures of Georgia, Tennessee, and South Carolina have, along with the federal government, funded resource centers in those states.

The evidence at trial revealed that a number of states, including Ohio, Illinois, New Jersey, and Connecticut, have authorized their public defender offices to set up special capital post-conviction programs to provide representation or support. (Tr. 43) Other states -- Kentucky, Maryland, Nevada, and New Mexico -- have public defender offices that have actually represented Death Row inmates in post-conviction proceedings. Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 American University Law Review 513, 558-61 (1988). Wyoming's state-wide public defender office is under order from the state supreme court to represent Death Row inmates throughout post-conviction proceedings. *Id.* at 561.

Since numerous states -- as well as various branches of the federal government -- have just begun to examine the issue seriously and to experiment with alternatives, and since no other Court of Appeals has yet had an opportunity to consider the legal assistance provided by any other state to its Death Row inmates in post-conviction proceedings, this issue is not yet ripe for Supreme Court review. As Justice Stevens wrote, concurring in the denial of certiorari in *Perry v. Louisiana*, 461 U.S. 961 (1983):

I believe that further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date. There is presently no conflict of decision within the federal system. . . . In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.

Id.

II. THE DISTRICT COURT'S DECISION WAS A CONVENTIONAL APPLICATION OF *BOUNDS* V. SMITH

As Petitioners acknowledge, this Court in *Bounds v. Smith*, 430 U.S. 817, 828 (1977), emphatically reaffirmed that inmates have a "fundamental constitutional right of access to the courts." (Pet. at 5) In attempting to show that the opinions below are some grotesque extension of *Bounds* warranting "summary reversal" by this Court, however, Petitioners argue that *Bounds* was more concerned with form than substance: Petitioners contend that if a state provides a law library, then all other inquiry (such as whether that library in fact provides meaningful access) ceases. Consistent with their extraordinarily narrow interpretation of *Bounds*, Petitioners claim that they have only "a limited obligation" to provide assistance to inmates. (Pet. at 5) This limited obligation, they argue, can *never* -- under any circumstances -- require that they provide an inmate with counsel. (*Id.* at 5-7)

Neither this Court nor any of the courts construing *Bounds* has ever embraced Petitioners' formalistic interpretation of the right of access to the courts. In fact, *Bounds* and its progeny squarely and explicitly reject Petitioners' approach in favor of an analysis that focuses on whether a State's program of assistance *in fact* provides meaningful access to the courts for all prisoners, including those with special handicaps and circumstances. *See, e.g., King v. Atiyeh*, 814 F.2d 565, 568 (9th Cir. 1987) ("There is no established minimum requirement that a state must meet in order to provide indigent inmates with adequate access to the courts. Instead, a reviewing court should focus on whether the individual plaintiff before it has been denied meaningful access."). This is precisely the analysis applied by the Fourth Circuit in this case.

This Court emphasized in *Bounds* that mere "access to the courts" is not enough. That access must be "adequate, effective, and meaningful," and it must extend to "all prisoners." *Id.* at 822, 824 (emphasis added). Indeed, *Bounds* specifically distinguished "the access rights of ignorant and illiterate inmates . . . unable to present their own claims in writing to the courts" from those of "in-

mates able to present their own cases." *Id.* at 823-24. As an example, this Court noted that for illiterate inmates, a law library alone is not enough -- meaningful access "required *at least* allowing assistance from their literate fellows." *Id.* (emphasis added).

Subsequent to *Bounds*, courts have applied this Court's common-sense view and recognized that there are classes of inmates whose special circumstances require that they receive more than the minimum assistance permitted by *Bounds* -- a law library -- in order to achieve meaningful access. See, e.g., *Cruz v. Hauck*, 627 F.2d 710, 721 (5th Cir. 1980) (emphasis original) (holding that "[l]ibrary books, even if 'adequate' in number, cannot provide access to the courts for those persons who do not speak English or who are illiterate," and ordering the district court to "look at all the circumstances to determine whether *all* inmates have meaningful access to the courts"); *Valentine v. Beyer*, 850 F.2d 951, 956-57 (3rd Cir. 1988) (affirming district court's order prohibiting the state from closing a paralegal clinic, based on the district court's factual findings regarding the assistance provided by the clinic, the inadequacy of the State's proposed plan, and the special needs of closed custody, illiterate, and non-English speaking inmates); *Knop v. Johnson*, 655 F. Supp. 871, 882 (W.D. Mich. 1987) ("A court, rather, must measure the adequacy of defendants' system of legal access by the inmates' ability to gain access to the courts through that system. In this case, plaintiffs [illiterate inmates] have established a credible claim that they are not able to gain adequate, effective, and meaningful access to the courts through defendants' system.").

The District Court in this case similarly made factual findings regarding (1) the special -- indeed unique -- handicaps that hinder Virginia's Death Row inmates from challenging their death sentences, (2) the adequacy of legal assistance available to these inmates, and (3) what legal assistance they require in order to have adequate, effective, and meaningful access to the courts for pursuing post-conviction remedies. Based on these factual findings, the District Court and the Fourth Circuit (*en banc*) concluded that the assistance Petitioners provided (although sufficient for in-

mates in the general population) did not ensure this special class of inmates meaningful access to post-conviction remedies.

Petitioners' real dissatisfaction with the decisions below is not the courts' application of the *Bounds* principles, but rather their remedy -- even though district courts generally have broad discretion to fashion remedies to correct constitutional violations *and even though* the District Court below expressly delegated much discretion to Petitioners themselves. See *Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978) ("Once invoked, 'the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.'"). In the face of this broad discretion, Petitioners argue that a court may *never*, under any circumstances, devise a remedy for a *Bounds* violation that requires the state to develop a system for providing legal assistance in the form of lawyers.

The courts construing *Bounds*, however, have not adopted Petitioners' rigid rule, but rather have ordered the provision of lawyers when the special circumstances of the plaintiffs required it. See, e.g., *Smith v. Bounds*, 841 F.2d 77, 77-78 (4th Cir. 1988) (*en banc*) (affirming district court's order requiring prison legal services when, after a 10-year period, the court found that "North Carolina was unable or unwilling to implement its library plan consistent with minimum constitutional requirements."); *Hadix v. Johnson*, No. 80-73581, 1988 West Law 81732 (E.D. Mich. July 1, 1988) (requiring prison legal services program for illiterate inmates and those in segregation and for other inmates because state failed to provide adequate law library); *Canterino v. Wilson*, 562 F. Supp. 106, 112 (W.D. Ky. 1983) (requiring prison legal services for women inmates because they "do not have a history of self-help in the legal field"); *Gilmore v. Lynch*, 319 F. Supp. 105, 110 (N.D. Cal. 1970), *aff'd*, 404 U.S. 15 (1971) ("In some contexts [meaningful access] has been interpreted to require court-appointed counsel for indigents.").

Thus, far from conflicting with all the other Courts of Appeals, as Petitioners suggest,¹⁰ the Fourth Circuit's carefully cir-

¹⁰ Petitioners' string-cite of supposedly conflicting decisions (Pet. at 6) cannot survive scrutiny. Not one of these decisions involves Death Row inmates and their

cumscribed decision is utterly consistent with the approach taken by other federal courts in applying *Bounds*. Certainly there is no direct conflict between the decision in this case and any other decision: This is the *first* time a federal appellate court has ruled on the assistance necessary to provide Death Row inmates with meaningful access to post-conviction remedies.

Only a month ago, however, the Third Circuit, in remanding for further findings of fact as to Death Row inmates' access generally, reached a conclusion essentially identical to that of the Fourth Circuit:

[T]he Court in *Bounds* did not suggest that the right of access to the courts is always to be measured by a single standard irrespective of the nature of the proceedings. It may well be that the scope of access to legal resources required under *Bounds* varies according to the proceeding. In proceedings directly implicating the validity of a death-sentenced prisoner's conviction, the availability of legal assistance from lawyers, rather than from other sources of legal knowledge, is more central to the vindication of prisoners' claims than in other civil claims filed by a death-sentenced prisoners, such as, for example, those complaining of conditions of confinement.

Peterkin v. Jeffes, No. 87-1312, 1988 West Law 86503 at 23 (3d Cir. Aug. 23, 1988). This case, of course, involves *only* the unique circumstances of Virginia's death-sentenced prisoners' right to pursue post-conviction proceedings once -- proceedings that will for them be the difference between life and death.

Thus, the decisions of the District Court and the Fourth Circuit fall squarely within mainstream *Bounds* analysis. This case

unique plights. They involve only the access of *general population* inmates. Moreover, most of the cited cases do not even address the question whether the remedy of lawyers is ever appropriate. See, e.g., *Carter v. Fair*, 786 F.2d 433 (1st Cir. 1986) (inmates offered no substantive evidence that lawyer assistance program failed to provide meaningful access); *Spates v. Manson*, 644 F.2d 80 (2d Cir. 1981) (public defender services providing actual representation sufficient under *Bounds*).

does not involve Respondents seeking an exceptional extension of *Bounds*, but rather Petitioners demanding an unwarranted constriction of *Bounds*.

III. THIS COURT SHOULD NOT EXERCISE ITS CERTIORARI JURISDICTION TO REVIEW THE FINDINGS OF FACT FOUND CONCURRENTLY BY THE DISTRICT COURT AND THE COURT OF APPEALS

Essential to the Petition is Petitioners' and dissenting Judge Wilkins's dispute with the factual findings of the District Court -- findings the Fourth Circuit held were not clearly erroneous. Petitioners urge this Court to exercise its certiorari jurisdiction to engage in the same activity that necessitated the vacatur of the panel decision: appellate fact finding.

Indeed, Petitioners openly state: "Both the district court and the Fourth Circuit majority relied on the *erroneous* conclusion that appointment of counsel to represent inmates was available under state law only after a petition raising non-frivolous claims was filed." (Pet. at 10; emphasis added) As a second example, Petitioners contend that Death Row inmates have "access to legal information and assistance" through law libraries and institutional attorneys (Pet. at 3), although the Fourth Circuit found that Death Row inmates at two of Virginia's three Death Row prisons "are not permitted to visit the libraries," and the District Court found that "[n]o pretense is made by the Defendants in this case that these few [institutional] attorneys could handle the needs of death row prisoners in addition to providing assistance to other inmates." 847 F.2d at 1119; 668 F. Supp. at 514. As a third example, Petitioners contend that "[a]ll Death Row inmates in Virginia have had the assistance of an attorney, whether volunteer or court appointed, in pursuing state habeas corpus remedies" (Pet. at 3, 10 n.4), yet they are forced to concede that, at the time of the trial below, "one inmate did not then have counsel." (Pet. at 2) Indeed, the District Court found that the days when lawyers would volun-

teer to represent a Death Row inmate *pro bono* "are gone." 668 F. Supp. at 515.¹¹

Remarkably, Petitioners' sole acknowledgment of the District Court's findings of fact is relegated to a footnote. (Pet. at 10 n.1) No explanation is offered as to how they are so clearly erroneous as to require this Court to conduct the same appellate fact-finding in which the Fourth Circuit, acting *en banc*, refused to engage. In fact, the Fourth Circuit, in holding that the District Court's findings of fact were not clearly erroneous, properly exercised its appellate role by refusing to retry the case. *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."); *Amadeo v. Zant*, 108 S.Ct. 1771, 1780 (1988) (A court of appeals may not "engage in impermissible appellate fact finding").

The usual practice of this Court is to "accord great weight to a finding of fact which has been made by a district court and approved by a court of appeals." *N.C.A.A. v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984). Indeed, "this court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts." *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank and Manufacturing Company v. Linde Air Products Company*, 336 U.S. 271, 275 (1949). This case should be no exception.

¹¹ Petitioners' extensive argument that "death is not different" as a matter of law (Pet. at 8-11) is likewise a transparent attempt to circumvent the District Court's factual findings that the fact of being on Virginia's Death Row results in unique restraints on an inmate's ability to exercise his right to access to the courts for post-conviction proceedings in an adequate, effective, and meaningful manner.

IV. THE DECISIONS BELOW DO NOT CONFLICT WITH THIS COURT'S RECENT DECISION OF *PENNSYLVANIA V. FINLEY*

Throughout their Petition, Virginia's officials accuse the Fourth Circuit and the District Court of "creat[ing] a new right to counsel." (Pet. at 4, 6, 8, 9, 11, 12, 14) In fact, it is Petitioners who have manufactured the "right to counsel" concept. Other than where quoting Petitioners, this term appears neither in the *en banc* opinion nor in the district court memorandum.

Petitioners' mischaracterization of the lower courts' decisions as creating law is ironic. Petitioners themselves want this Court to make new law by extending *Pennsylvania v. Finley*, 107 S.Ct. 1990 (1987), to outlaw provision of post-conviction counsel as a remedy available to federal courts.

In *Finley*, as the Fourth Circuit recognized, this Court held that the procedural framework of *Anders v. California*, 386 U.S. 738 (1967), does not apply to Pennsylvania post-conviction lawyers seeking to withdraw from representation. 847 F.2d at 1121. This Court based its decision on there being no "constitutional right to counsel" for post-conviction proceedings. 107 S.Ct. at 1993 (emphasis added).

Finley did not address whether provision of post-conviction representation would in every conceivable situation be an impermissible remedy for a federal court. Yet the adoption of such a construction is precisely what Petitioners urge. Merely by characterizing any remedial order providing representation as "creating a new right to counsel," Virginia and other states can similarly oppose -- no matter what the facts -- every potential judicial determination that such relief might be warranted.

As an example of such a remedial order, the Fourth Circuit found, in a later proceeding in *Bounds* itself, that North Carolina had engaged in "a decade-old pattern of neglect and delay" to ignore or circumvent this Court's 1977 *Bounds* decision. 813 F.2d 1299, 1304-05 (4th Cir. 1987), *opinion adopted en banc*, 841 F.2d 77 (4th Cir. 1988). Because North Carolina had failed to provide meaningful access through adequate law libraries, the Eastern

District of North Carolina ordered the remedy of providing North Carolina's prisoners with a prison legal services program. In affirming, the Fourth Circuit certainly did not address whether *Finley* divested federal courts of their powers to fashion such relief.

Conversely, this Court did not mention *Bounds* in its *Finley* decision. Had this Court intended *Finley* to have the far-ranging preclusiveness Petitioners now urge, the Court would have had to address *Bounds*. Supreme Court decisions spawning more than 500 published opinions in the federal reporters are not overruled or substantially limited *sub silentio*.¹²

In sum, by unilaterally pasting a "right to counsel" label on a district court's remedy, Petitioners have attempted to fabricate a conflict with Supreme Court precedent. It would behoove them to consider what this Court said in *Finley*:

Respondent apparently believes that a "right to counsel" can have only one meaning, no matter what the source of that right. But the fact that the defendant has been afforded assistance of counsel in some form does not end the inquiry for federal constitutional purposes. Rather, it is the source of that right to a lawyer's assistance, combined with the nature of the proceedings, that controls the constitutional question.

107 S.Ct. at 1997. The invocation of mere incantations is insufficient to justify exercise of this Court's certiorari jurisdiction.

V. PETITIONERS' PREDICTION THAT THE DECISION BELOW WILL SPUR "A POTENTIALLY ENDLESS SUCCESSION OF COLLATERAL PROCEEDINGS" DISREGARDS THE LAW

In their ardor to attract this Court's attention, Petitioners invoke the spectre of never-ending litigation creating "infinite delay" in carrying out executions. If the decision below stands, accord-

¹² Moreover, interpreting *Finley* to limit *Bounds* creates an enormous anomaly. *Finley* only affects post-conviction proceedings, while *Bounds* provides an across-the-board right of access. Under Petitioners' theory, a court could find that lawyers were an appropriate *Bounds* remedy for illiterate prisoners who could not

ing to Petitioners, not only will "protracted and repetitive litigation" result, but such litigation will manifest in "a potentially endless succession of collateral proceedings in which the petitioner invokes a right to counsel to challenge the effectiveness of the next previous attorney." (Pet. at 12) Petitioners have thus formulated the ultimate exaggeration of the rusty "floodgates" defense: infinite litigation.

Petitioners' hysteria over potentially "endless" post-conviction litigation to challenge the effectiveness of previous lawyers is unjustified. The possibility of such "infinite delay" no longer exists. Virginia has already jousted with this spectre -- and won.

A Virginia Death Row inmate cannot rely on the decisions below to argue that he has the right to effective assistance of counsel in a Virginia state habeas proceeding. When the late Richard L. Whitley tried to do exactly that, the Fourth Circuit held: "The sole question presented in this appeal is whether, in view of the case of *Giarratano v. Murray*, 668 F. Supp. 511 (E.D. Va. 1986), the performance of Whitley's attorneys in his state habeas petition should be judged by the constitutional standard of ineffectiveness of counsel. . . . *Finley* forecloses Whitley's contention on appeal." *Whitley v. Muncy*, 823 F.2d 55, 56 (4th Cir. 1987); see also *Finley*, 107 S.Ct. at 1994 ("it is the source of that right to a lawyer's assistance, combined with the nature of the proceedings, that controls" whether one has the right to "effective" assistance of counsel).

Mr. Whitley was executed four days after he invoked the District Court decision below to challenge the effectiveness of his post-conviction attorney. No Virginia Death Row inmate has tried this approach since. The next one to do so is unlikely to achieve any more "infinite delay" of his execution than did Mr. Whitley.

otherwise bring civil rights actions, draft wills, or file divorce papers, but *Finley* would preclude this same court from finding that a lawyer is necessary to obtain a stay of execution.

**VI. THE ALTERNATIVE TO THE DECISIONS
BELOW IS PERPETUATION OF CONFUSION
AND DELAY**

Petitioners themselves suggest that "[t]his Court is particularly aware of the confusion and delay that is now the hallmark of capital post-conviction litigation." (Pet. at 11) Petitioners urge that this "system" continue unaltered.

Virginia's "patchwork system of assistance" is but an incubator of confusion, misdirection, and, ultimately, delay. See 668 F. Supp. at 515. Petitioners advocate a "system" in which institutional attorneys who have never prepared capital habeas petitions are somehow held responsible for preparing all such petitions for Death Row, where Death Row inmates draft petitions for writ of certiorari for other Death Row inmates, where the attorney advising a Death Row inmate changes when the inmate is transferred from one prison to another, where inmates spend their final 15 days barred from any library, where a Death Row inmate is denied counsel in the same order that schedules his execution, and where (until recently) volunteer lawyers rush in at the last moment and submit hurriedly prepared papers asking for stays of execution.

The District Court's remedy of providing for legal representation at an early stage can only ameliorate, rather than compound, the confusion that is now the "hallmark" of capital post-conviction litigation in Virginia. Petitioners' own witness, the Coordinator of All Capital Litigation in the Commonwealth, completely agreed:

- Q. Why is that the position of the Attorney General's Office?
- A. Well, basically we want to see the inmate have an attorney at state habeas for reasons of economy and efficiency. When you have a death case, we recognize that it is going to be prolonged litigation. And we want to see all matters that the inmate or the petitioner wants to raise be raised at one proceeding, and we can deal more efficiently with an attorney. And we prefer that from an economy

standpoint we don't have to have more than one proceeding.

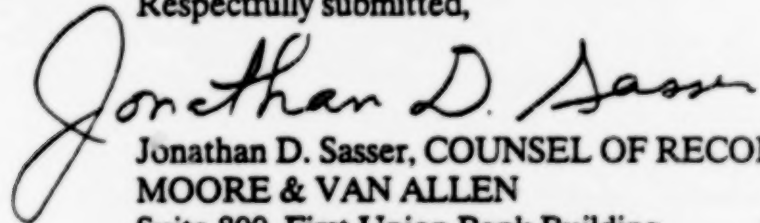
(Tr. 425-26)

In light of the fact that *Pennsylvania v. Finley* and *Whitley v. Muncy* bar Virginia's Death Row inmates from challenging the effectiveness of their post-conviction counsel, there is simply no factual or legal basis to conclude that the presence of a single lawyer throughout state habeas proceedings -- instead of an unrepresented Death Row inmate, or a volunteer who appears a few days before an execution date, or a series of volunteer lawyers -- "is certain to cause confusion." (See Pet. at 14) Indeed, it is the only hope for eliminating the confusion that now exists.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



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No. 88-411

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JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1988

— o —
EDWARD W. MURRAY, Director,
Virginia Department of Corrections, *et al.*,
Petitioners,

v.

JOSEPH M. GIARRATANO, *et al.*,
Respondents.

— o —
ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

— o —
BRIEF AMICI CURIAE OF THE STATES OF
GEORGIA, MISSISSIPPI, NORTH CAROLINA,
MISSOURI, SOUTH DAKOTA, WYOMING,
DELAWARE, CALIFORNIA, PENNSYLVANIA,
NEW MEXICO, INDIANA, KENTUCKY, NEW
HAMPSHIRE, NEVADA, UTAH, SOUTH CAROLINA,
OREGON, MARYLAND, IDAHO IN SUPPORT
OF PETITIONERS

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No. 88-411

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In The
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EDWARD W. MURRAY, Director,
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**BRIEF AMICI CURIAE OF THE STATES OF
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NEW MEXICO, INDIANA, KENTUCKY, NEW
HAMPSHIRE, NEVADA, UTAH, SOUTH CAROLINA,
OREGON, MARYLAND, IDAHO IN SUPPORT
OF PETITIONERS**

—o—
PART ONE

INTEREST OF AMICI CURIAE

Amici Curiae are those states that authorize capital punishment and afford noncriminal postconviction procedures by which convicted criminal defendants may challenge their convictions and sentences. The Fourth Circuit Court of Appeals' decision in *Giarratano v. Murray*, 847 F.2d 1118 (4th Cir. 1988) (*en banc*), (constitutionally

mandating appointed counsel to represent capital defendants in state noncriminal postconviction proceedings) is truly in direct conflict with applicable decisions of this Court, and such conflict is readily apparent upon an examination of the lower court's rationale and result. Because the circuit court's opinion constitutes such a marked departure from and stands in direct conflict with this Court's precedent, amici curiae urge that Petitioner's request for certiorari be granted, that the opinion of the Fourth Circuit Court of Appeals be reversed and that stability and continuity be restored to this area of constitutional law.

PART TWO

SUMMARY OF THE ARGUMENT

In *Giarratano v. Murray*, 847 F.2d 1118 (4th Cir. 1980), (*en banc*), the Fourth Circuit Court of Appeals clearly disregarded and refused to adhere to prior applicable precedent of this Court, which precedent has consistently found the absence of a constitutional right to appointed counsel in state noncriminal postconviction proceedings. This true and direct conflict between the circuit court and this Court's opinion in *Pennsylvania v. Finley*, — U.S. —, 107 S.Ct. 1990 (1987), constitutes a sufficient basis to authorize the requested writ of certiorari. The real and intolerable disruption of state noncriminal postconviction proceedings occasioned by a constitutional mandate of appointment of counsel, the attending inquiries into habeas counsel's effectiveness and the resulting dissipation of any concept of finality of state crim-

inal proceedings, warrants the granting of Petitioner's requested writ of certiorari.

PART THREE

ARGUMENT

I. THE CIRCUIT COURT'S OPINION IN *GIARRATANO v. MURRAY*, 847 F.2d 1118 (4th Cir. 1988) (*EN BANC*), IS IN TRUE AND DIRECT CONFLICT WITH THIS COURT'S OPINION IN *PENNSYLVANIA v. FINLEY*, — U.S. —, 107 S.Ct. 1990 (1987), WHICH CONFLICT IS READILY APPARENT FROM THE CIRCUIT COURT'S RATIONALE AND RESULT.

In *Giarratano v. Murray*, 847 F.2d 1118 (4th Cir. 1988) (*en banc*), the Fourth Circuit Court of Appeals opined that, "under the unique circumstances of post-conviction proceedings involving a challenge to the death penalty" (847 F.2d at 1122), the constitutional requirement of meaningful access to the courts discussed in *Bounds v. Smith*, 430 U.S. 817 (1977), requires the appointment of counsel in state noncriminal postconviction proceedings. The circuit court's rationale and result were formulated and rendered notwithstanding its access to and examination of the Court's opinion in *Pennsylvania v. Finley*, — U.S. —, 107 S.Ct. 1990 (1987).

In *Pennsylvania v. Finley*, the Court, after a review of its relevant precedent, stated the following:

We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks to their convictions (cite omitted), and we de-

cline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals. (cites omitted). We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process. (cited omitted).

Pennsylvania v. Finley, 107 S.Ct. at 1993.

Revisiting its review in *Ross v. Moffitt*, 417 U.S. 600 (1974), of the defendant's claim to appointed counsel on a discretionary appeal, the Court in *Pennsylvania v. Finley*, reiterated that Respondent Moffitt's assertion has been found to be without support from either the Due Process Clause or the equal protection guarantee of the Fourteenth Amendment. As there exists no support from these constitutional sources for an asserted guarantee of counsel on a discretionary appeal, the Court in *Pennsylvania v. Finley*, concluded that "These considerations apply with even more force to postconviction review." * * * "Postconviction relief is even further removed from the criminal trial than is discretionary direct appeal. It is not part of the criminal proceeding itself, and is in fact considered to be civil in nature." 107 S.Ct. at 1994.

In an attempt to distinguish *Pennsylvania v. Finley* the circuit court remarked merely that "*Finley* was not a meaningful access case, nor did it address the rule enunciated in *Bounds v. Smith*. Most significantly, *Finley* did not involve the death penalty." *Giarratano v. Murray*, 847 F.2d at 1122.

The Court in *Pennsylvania v. Finley*, however, did address the constitutional concept of "meaningful access," noting that "meaningful access" has been afforded a defendant when he or she has been provided access to and the assistance of counsel for purposes of trial and direct appeal. 107 S.Ct., at 1994. The circuit court's observation that *Pennsylvania v. Finley*, was not a capital case adds nothing to its attempt to distinguish between *Finley* and *Ross*. Rather, the accordance of such unwarranted weight by the circuit court to this factor truly underscores the lower court's effort to disregard prior precedent of this Court and create a new *per se* rule of appointment of counsel for capital litigants in noncriminal postconviction proceedings.

Where the decision of a circuit court clearly fails to apply or adhere to prior Supreme Court precedent, certiorari is warranted. *Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982). In the instant case the Fourth Circuit Court of Appeals has clearly disregarded and refused to adhere to prior Supreme Court precedent resulting in the rendition of a decision whose conflict with *Pennsylvania v. Finley*, is readily apparent. The result has been the creation of a constitutional "right" where no such right exists and the denigration of the interests of comity and finality.

CONCLUSION

Because the Fourth Circuit Court of Appeals' *en banc* decision threatens real and intolerable disruption of state postconviction proceedings, and at the very least conflict among the circuit courts regarding the proper applicable constitutional standard, and as this is a case in which this Court's certiorari jurisdiction is clearly authorized and warranted, amici curiae respectfully request that this Court grant Petitioners' request for a writ of certiorari.

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88-411

Supreme Court, U.S.

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IN THE UNITED STATES SUPREME COURT
October Term, 1987
Case No. _____

EDWARD W. MURRAY, DIRECTOR,
DEPARTMENT OF CORRECTIONS,
COMMONWEALTH OF VIRGINIA, et al.,

Petitioners,

v.

JOSEPH M. GIARRATANO, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**BRIEF OF AMICUS CURIAE
STATE OF FLORIDA**

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481-11

QUESTION PRESENTED

**WHETHER CERTIORARI SHOULD BE
GRANTED TO REVIEW A CIRCUIT COURT
ORDER REQUIRING THE COMMONWEALTH
OF VIRGINIA TO CREATE A RIGHT TO
COUNSEL IN STATE COLLATERAL
PROCEEDINGS AND PROVIDE COUNSEL TO
ALL STATE COURT LITIGANTS.**

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INTEREST OF AMICUS CURIAE

The State of Florida, as Amicus Curiae, is deeply concerned with the en banc decision of the Fourth Circuit for two reasons:

First, Florida has adopted a first in the nation pilot program to provide counsel for indigent death row inmates. We have scrupulously sought to avoid the creation of new grounds for collateral attack (such as "ineffective collateral counsel"), or the creation of new "due process" rights. Florida will have to give serious consideration to abandoning this project.

Second, Florida, like all states, is concerned that unelected federal judges, in the absence of any federal constitutional basis for their action, can by judicial decree, create "state" due process rights and direct the expenditure of public funds

to achieve social objectives not required by the Constitution of the United States.

We will not repeat the arguments set forth by the Commonwealth of Virginia, although we adopt them. We shall raise additional reasons for granting review in this case as perceived by the Amicus Curiae.

SUMMARY OF ARGUMENT

Certiorari should be granted given the conflict between the decision of the en banc Fourth Circuit Court of Appeals and prior decisional law of this Court and the other federal circuits regarding the existence of a "right" to state court collateral attack and collateral counsel.

Certiorari should also be granted pursuant to this Court's supervisory powers to protect the supremacy of your decisions and to correct a "shockingly wrong" lower court decision which carries serious "due process" consequences.

Finally, certiorari should be granted in lieu of this Court's non-discretionary duty to guarantee a "Republican Form of Government" to the people and Commonwealth of Virginia. The Fourth Circuit lacks constitutional authority to declare the existence of a "state" right to collateral

counsel or to usurp the legislative function of directing any expenditure of public funds to protect said "right".

ARGUMENT

The Amicus Curiae has taken the liberty of amending the question presented to add focus to what it perceives as the reasons for granting certiorari. Florida would also suggest that the following constitutional provisions apply:

(1) The Tenth Amendment to the Constitution of the United States says in relevant part:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or the people.

(2) Article IV, Section 4 of the Constitution of the United States says in relevant part:

The United States shall guarantee to every State in this Union a Republican Form of Government.

-A-

CERTIORARI SHOULD BE GRANTED
DUE TO CONFLICT BETWEEN THE
DECISION OF THE CIRCUIT COURT
AND DECISIONAL LAW OF THIS
AND OTHER FEDERAL CIRCUITS.

In **Smith v. Phillips**, 455 U.S. 209, 218 (1982), this Court held that a state cannot be compelled to provide "greater" due process than the federal government. The case at bar involves a decision by the Fourth Circuit that requires Virginia to provide counsel to state court litigants (engaged in post-conviction collateral attack), even though those same litigants, upon filing identical claims pursuant to 28 U.S.C. §§2254 or 2255, would not be guaranteed counsel by the federal courts.

We submit that if the federal government has no obligation to guarantee counsel in every §2254 or §2255 proceeding,

no such obligation can be imposed on a state.

Federal habeas corpus, whether sought pursuant to 28 U.S.C. §2254 or 2255, is a non-constitutional remedy which is not to be equated with constitutional (pre-trial) habeas corpus. In **United States v. MacCollum**, 426 U.S. 317, 323 (1976), this Court held:

The due process clause of the Fifth Amendment does not establish any right to an appeal . . . and certainly does not establish any right to collaterally attack a final judgment of conviction.

Since no right to collateral attack exists, there is no right to counsel either. **Wainwright v. Torna**, 455 U.S. 586 (1982); see **Ross v. Moffitt**, 417 U.S. 600 (1974); **Johnson v. Avery**, 393 U.S. 483 (1969), see also **Pennsylvania v. Finley**, 481 U.S. _____, 95 L.Ed.2d 539, 107 S.Ct. 1990 (1987). Indeed, in §2255 proceedings

the federal judiciary has discretion to appoint or deny counsel based upon the facial complexity of the petition. *Barker v. Ohio*, 330 F.2d 594 (6th Cir. 1964); *Alford v. United States*, 709 F.2d 418 (5th Cir. 1983); *Brown v. United States*, 623 F.2d 54 (9th Cir. 1980); *United States v. De Gand*, 614 F.2d 176 (8th Cir. 1980).

For the Fourth Circuit to impose a mandatory duty on the state to create a system for appointment of counsel in every collateral case, when no such burden has been placed on the federal judiciary, flaunts the Constitution and clearly conflicts with the decisional law of this Court and the other circuits. Such ultra vires conduct cries out for intervention by this Honorable Court.

-B-

CERTIORARI SHOULD BE GRANTED
TO CURE ERROR THAT IS
"SHOCKINGLY WRONG".

In direct contradiction of the holding of *Smith v. Phillips*, supra, the Fourth Circuit wishes to usurp administrative or supervisory control over the courts of the Commonwealth of Virginia, create "state" rights where no corresponding federal constitutional rights exist and finally to direct the expenditure of public funds to finance the (court) majority's "social engineering scheme".

Certiorari review has traditionally been granted to review lower court errors which are "shockingly wrong" or have true "due process" consequences. *Graver Mfg. v. Linda*, 336 U.S. 271 (1948); *Berenyi v. Immigration Director*, 385 U.S. 630 (1967); *Thompson v. Louisville*, 362 U.S. 199

(1961); see also *Gerstein v. Pugh*, 420 U.S. 103 (1975).

Relying upon the same legal arguments set forth above, we submit that in the absence of "conflict", or in addition thereto, certiorari should be granted due to the shocking and unconscionable conduct of the Fourth Circuit in attempting to impose obligations upon the Commonwealth of Virginia which said Court knew or should have known were not required by the Constitution.

-C-

**THE FEDERAL GOVERNMENT HAS A
MANDATORY, NOT DISCRETIONARY,
DUTY TO PROVIDE ARTICLE IV
RELIEF.**

It is a fundamental aspect of our constitutional government that the United States "shall", (not "may" or "in its

discretion") guarantee a Republican Form of Government.

It is also an undisputable aspect of state sovereignty that states may create and control their own legal systems so long as federal constitutional standards are not violated.

Virginia, acting within its rights, has created a collateral attack system which is nearly identical to that created by 28 U.S.C. §2255, especially as it relates to the appointment of counsel. Now, a panel of federal judges, acting upon their perceived social aims rather than the Constitution, have legislated a new "state right to counsel" where no such right, state or federal, exists.

It is for the people of Virginia, not the Fourth Circuit, to create any "right" to collateral counsel or any new mechanism for providing same. This essentially

autocratic decision by the Fourth District thus runs afoul of Article IV, compelling correction by this Honorable Court as the agency of the United States uniquely empowered to prevent this abuse.

We respectfully urge this Court to act.

CONCLUSION

We submit that certiorari should be granted to review the decision of the Fourth Circuit. The Court's action is at once autocratic and without any basis in the Constitution. It is also clearly in conflict with the decisional law of this Court.

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Jay Topkis, Steven E. Landers, Alisa D. Shudofsky, PAUL, WEISS, RIFKIND, WHARTON & GARRISON, 1282 Avenue of the Americas, New York, New York 10019; Mr. Jonathan D. Sasser, MOORE & VAN ALLEN, 301 W. Main Street, Suite 800, Durham, N.C. 27702; and to Martha A. Geer, SMITH, PATTERSON, FOLLIN, CURTIS, JAMES & HARKEVY, 720 Southeastern Building, Greensboro, N.C. 27401, this ____ day of September, 1988.

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DEC 15 1988

JOSEPH F. SPANGL, JR.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

EDWARD W. MURRAY, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS, et al.,
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v.

JOSEPH M. GIARRATANO, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR CERTIORARI FILED AUGUST 31, 1988
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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

August 6, 1985 - Plaintiff Garrantano's original complaint filed in U. S. District Court for Eastern District of Virginia, Richmond Division.

August 28, 1985 - Defendant's Motion for Summary Judgment and Memorandum filed.

September 3, 1985 - Defendant's Answer filed.

September 5, 1985 - Plaintiff's Amended Complaint (Letter to Judge Merhige) filed.

September 5, 1985 - Order entered granting leave to amend complaint.

February 13, 1986 - Motion to Intervene, Substitute Party and Join Parties, with Memorandum, filed.

February 13, 1986 - Motion for Preliminary Injunction and Memorandum filed.

March 3, 1986 - Order entered granting leave to intervene; Gerald L. Baliles, Robert Baldwin, and Michael Samberg, in official capacities, joined as parties defendant; Edward Murray substituted for Allyn R. Sieliaff as party defendant.

March 3, 1986 - Class Action Complaint in Intervention filed.

March 19, 1986 - Defendant's Response to Motion for Preliminary Injunction filed.

March 26, 1986 - Defendant's Answer filed.

April 14, 1986 - Plaintiff's Motion for Class Certification, with Memorandum, filed.

April 16, 1986 - Plaintiff's reply Memorandum in Support of Motion for Preliminary Injunction filed.

April 28, 1986 - Defendant's Response to Motion for Preliminary Injunction filed.

May 9, 1986 - Defendant's Motion for Summary Judgment, with Memorandum, filed.

May 19, 1986 - Plaintiff's Reply Memorandum in Support of Motion for Class Certification filed.

May 29, 1986 - Order entered granting Plaintiff's Motion for Class Certification.

June 3, 1986 - Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment filed.

June 24, 1986 - Argument on Defendant's Motion for Summary Judgment.

July 8, 1986 - Order entered and Memorandum Opinion filed, denying Defendant's Motion for Summary Judgment.

July 10, 1986 - Trial of action, before district court, commenced.

July 11, 1986 - Trial concluded, case taken under advisement.

December 18, 1986 - Final Judgment Order entered, with Memorandum Opinion.

December 26, 1986 - Plaintiff's Motion to Adopt Proposed Findings of Fact filed.

January 6, 1987 - Defendant's Notice of Appeal filed.

January 20, 1987 - Plaintiff's Notice of Appeal filed.

January 29, 1987 - Order entered denying Plaintiff's Motion for additional finding of fact.

February 9, 1987 - Defendant's Notice of Appeal filed.

February 17, 1987 - Plaintiff's Notice of Appeal filed.

January 4, 1988 - Opinion and Judgment of the Court of Appeals for the Fourth Circuit.

February 19, 1988 - Order entered granting rehearing en banc.

June 3, 1988 - Opinion and Judgment of the Court of Appeals for the Fourth Circuit (en banc).

June 22, 1988 - Defendant's / Appellant's Motion to Stay Mandate filed.

July 19, 1988 - Order granting motion to stay mandate.

July 29, 1988 - Plaintiff's / Appellee's petition for rehearing and suggestion of rehearing en banc of Defendant's Motion for Stay of Mandate filed.

September 1, 1988 - Order granting reconsideration of previous order staying mandate, and vacating order granting stay.

September 1, 1988 - Mandate issued.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Richmond Division)

Joseph M. Giarratano,
John Doe(s)

Plaintiff's

v.

Civil Action No. 85-0655-R

Allyn R. Sielaff, Director
Virginia Department of Corr.
Commonwealth of Virginia,
Defendant's

COMPLAINT AND JURISDICTION

This is a Sec. 1983 action filed by Joseph M. Giarratano, and John Doe(s) plaintiff's, a state prisoner, alleging violation of constitutional rights and seeking declaratory judgment, and injunctive relief.

JURISDICTION

1. This is a civil rights action under 42 U.S.C. section 1983. This court has jurisdiction under 28 U.S.C. section 1343.

PARTIES

2. Plaintiff Joseph M. Giarratano is presently incarcerated at the Mecklenburg Correctional Center, Boydton, Virginia. Plaintiff Giarratano is currently under sentence of death.

3. Plaintiff's John Doe are various individuals also housed at Mecklenburg Correctional Center also under the sentence of death.

4. Defendants Allyn R. Sielaff is the current director of the Virginia Department of Corrections, and by virtue of his office retains physical custody over the parties plaintiff. Defendant Sielaff's office, by authority invested by the state of Virginia, will carry out and oversee the executions of the various plaintiff's: when such dates for execution are ordered.

5. Defendant Commonwealth of Virginia, by law, has the authority to enact statutes governing use of capital punishment in its jurisdiction for violation of the law.

STATEMENT OF FACTS

6. Indigent individuals convicted of capital crimes and sentenced to death in the state of Virginia are afforded legal counsel, at the Commonwealth's expense, at both stages of the bifurcated capital trial process. Such appointment of counsel to indigent defendants encompasses the automatic review of the conviction and or sentence by the Virginia Supreme Court, as is mandated by state law. After such review by the Virginia Supreme Court the appointment of counsel is severed. Hereinafter, the indigent defendant can seek relief by means of the discretionary petition for writ of *certiorari*, to the United States Supreme Court. The other means for collateral challenge open to the capitally sentenced individual are: Petition for state *Habeas Corpus* relief; and after all available state remedies are exhausted, one may seek relief under the federal *habeas corpus* statutes.

7. The Commonwealth will not appoint counsel to an indigent capitally sentenced person to assist in collateral challenges. After the automatic review by the Virginia Supreme Court, and if the appeal is denied, the state of Virginia can/ will set a date for execution; and if the individual cannot hire an attorney, or is, because of mental deficiency, illiterate, unlearned in death law and procedures, or cannot find an attorney to act in his behalf on a *pro bono* basis, unable to perfect an appeal or file for a stay: the state of Virginia will proceed with the execution on the mere basis that the indigent (or otherwise handicapped), has not filed an appeal or motion for a stay.

Whereas, the capitally sentenced individual who has funds to hire counsel to file the necessary papers to initiate the collateral challenge and motion for a stay of execution can receive the full benefit of due process.¹

CLAIMS

First Cause of Action

8. The actions of the defendants stated in paragraphs 6 and 7, *supra*., deny plaintiff's First Amendment rights to access to the Courts.

¹ Though the reviewing Court where an appeal is filed has the discretion to appoint counsel for the indigent— the initial papers must be filed before the court can invoke its authority.

9. Plaintiff's First Amendment rights of access to the courts are violated when indigent capital sentenced individuals are not afforded legal counsel to perfect collateral challenges evolving from their conviction and death sentence; and can be executed by the State authorities, under existing policy or practice, if the individual cannot initiate proceedings.

Second Cause of Action

10. Plaintiff's Fourteenth Amendment rights to equal protection of the laws are violated when the State entertains an appeal by a capital sentenced individual who can afford an attorney, but will execute another capital sentenced individual who is unable to initiate the collateral process.

11. Plaintiff's Fifth and Fourteenth Amendment rights to due process of the law are violated when the state refuses to appoint legal counsel to assist the indigent (or otherwise handicapped), capital sentenced individuals in the perfection of a collateral challenge to his sentence and/or conviction and, at the same time, execute the individual if said appeal is not filed.²

RELIEF

WHEREFORE, plaintiff requests this Honorable Court grant the following relief; and any other relief the Court believes to be just and proper:

A. Issue a declaratory judgment that defendants violate the United States Constitution when they:

1. do not appoint legal assistance (counsel) to indigent capital sentenced individuals to perfect a collateral challenge of their convictions and/or sentences and, at the same time, start the execution process when said appeal is not initiated or filed.

² Though the indigent capital sentenced individual is permitted to proceed *pro se* with his collateral challenge - the right becomes salutary without the means or capability to perfect/initiate the process.

B. Issue an injunction ordering that defendants do not start the execution process until the indigent (or otherwise handicapped), capital sentenced individual is able to initiate the collateral challenge process.

Respectfully submitted,

/s/ Joseph M. Giarratano

Joseph M. Giarratano, *pro se*
Mecklenburg Correctional Center
Post Office Box 500
Boydton, Virginia 23917

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Richmond Division)

Joseph M. Giarratano,
Plaintiff

v. Civil Action No. 85-0655-R
Allyn R. Sielaff, Dir., et al.,
Defendants

ANSWER

Come now the defendants, by counsel, and for their Answer to the Complaint filed herein, respectfully set forth the following:

FIRST DEFENSE

Defendants incorporate herein, as if set forth in full at this point, each and every contention raised in their Motion For Summary Judgement and Memorandum Of Law In Support thereof previously filed with this Court.

SECOND DEFENSE

Defendants submit that the Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

Defendants deny that the plaintiff has been denied any right protected by the United States Constitution, and federal law, or any other law.

FOURTH DEFENSE

Defendants deny that the present action is cognizable under 42 U.S.C. § 1983, the Constitution of the United States, and 28 U.S.C. § 1343. Further, these defendants deny that any of their acts and/or omissions constitute state action or acts or omissions under color of state law. Defendants deny that proper parties are before this Court, and aver that this suit is designed to circumvent normal appellate procedures to challenge any discretionary denial of counsel in habeas corpus or appellate proceedings.

FIFTH DEFENSE

Defendants deny that plaintiff has suffered or is threatened with any cognizable injury or damage as a result of any acts or omissions on the part of these defendants.

SIXTH DEFENSE

Defendants allege and aver that, to the extent that plaintiff has suffered any deprivation, injury or damage, such deprivation, injury or damage was due to acts or omissions of the plaintiff or of others not under the control of the defendants, and for whose conduct they are not responsible in law.

SEVENTH DEFENSE

Defendants deny that plaintiff has suffered any injury or damage alleged and call for strict proof thereof.

EIGHTH DEFENSE

Defendants deny that they are indebted to or liable to the plaintiff in any sum whatsoever.

NINTH DEFENSE

Defendants submit that they enjoy immunity from suit and/or liability to the plaintiff.

TENTH DEFENSE

Plaintiff is possessed of adequate state remedies and has not suffered nor is threatened with any deprivation without due process.

ELEVENTH DEFENSE

Defendants submit that equitable and declaratory relief is barred because of mootness, adequacy of available legal remedies, the lack of an immediate threat of irreparable harm or threat of repetition of the alleged acts, the facts that only isolated acts and/or omissions are alleged, and the lack of any justiciable case or controversy and lack of standing.

TWELTH DEFENSE

With respect to the specific allegations set forth in the Complaint, these defendants state as follows:

a. Defendants deny that they are authorized or empowered to appoint counsel to represent indigent inmates and deny that any such appointment is constitutionally required under the circumstances of this case. Defendants aver that adequate legal resources are provided prisoners including law libraries and court-appointed attorneys at the prisoner's institution. Defendants further aver that adequate and ample procedures and resources exist to raise and determine any questions concerning the competency or disability of inmates. Defendants further aver that

authority to appoint attorneys to represent indigent prisoners lies with federal judges in federal appellate or habeas corpus proceedings and with state judges in state habeas corpus proceedings.

b. Defendants deny that plaintiff suffered any injury, damage, or deprivation as a result of their acts.

c. Defendants deny that at any time they violated any of the procedures of the Virginia Department of Corrections, and deny that they failed to provide plaintiff with due process, the equal protection of the laws, or access to the courts.

d. Defendants deny all allegations contained in plaintiff's Complaint insofar as they may pertain to them and will require strict proof thereof.

e. Defendants allege and aver that at all relevant times proper procedures were employed relative to the plaintiff and that the plaintiff was properly dealt with.

f. Defendants deny that they failed to comply with any applicable standard of care in their dealings with the plaintiff.

g. Defendants allege and aver that at all relevant times they acted in a reasonable and lawful manner without malice and indifference and in good faith discharged any duties they may have owed to the plaintiff.

h. Defendants deny all allegations not expressly admitted herein.

WHEREFORE, these defendants demand that this suit against them be dismissed with prejudice, and that they may recover their costs in and about the defense of this suit

Respectfully submitted,

ALLYN R. SIELAFF, DIR., *et al.*,
Defendants herein.

By: /s/ Richard F. Gorman, III

Counsel

Certificate omitted in printing

August 19, 1984

Joseph M. Giarratano
Mecklenberg Correctional Cntr.
P. O. Box 500
Boydton, Virginia 23917

The Honorable Robert R. Merighe
United States District Judge
P. O. Box 2-AD
Richmond, Virginia 23305

RE: *Joseph M. Giarratano, et al. v. Allyn R. Sielaff et al.*,
Civ. Act. No. 85-0655-R

Dear Judge Merighe,

I am writing at this time to request guidance of the Court regarding a matter of great concern. I sincerely apologize if this letter is not proper, but the gravity of the situation leaves me at a loss.

A fellow co-plaintiff in the above styled matter, Earl Washington, Jr., was transferred to the State Pen on August 16, for execution on September 5, 1985. Mr. Washington has all of his State post-conviction remedies open to him: unfortunately Mr. Washington is mentally incapable of acting in his own behalf. The Virginia Supreme Court has denied a request to appoint counsel to assist him in persuing a petition for state habeas corpus; or to stay the mandate. Because of his indigency he cannot retain counsel.

Ms. Marie Deans, Director of the Virginia Coalition on Jails and Prisons, has spoken with well over 50 attorneys in hopes that one would assist on a *pro bono* basis. To date all of these efforts have failed. The situation as described above has become common here of late. Ten days ago, with permission of the U. S. Supreme Court, I filed two cert. petitions on behalf of another co-plaintiff in the same situation, and circumstances.

I feel an enormous sense of responsibility with Mr. Washington's life at stake, and at a loss as to how to proceed. The allegations in my *pro se* complaint encompass this very dilemma.

The Honorable Robert R. Merighe
Page Two
August 19, 1985

The Court Order dated August 6, 1985, in the instant case, directs defendants' to file their response by the 26th of August; and, I am directed to file my return 20 days thereafter. It seems that my co-plaintiff will be executed before any response by me could be filed; or before any proper State relief could be sought.

It appears to me that if Mr. Washington is executed that fundamental principles of Due Process and Equal Protection would, literally, be thrown out of the window. I have spent the majority of the past 24 hours doing general research in this area and have located fairly strong precedent that would support my basic proposition. Most notable would be the line of "death is different" case, e.g.: *Lockette v. Ohio*, 438 U. S. 586 (1978); *Woodson v. North Carolina*, 428 U. S. 280 (1970); and, *Shaw v. Martin*, 613 F. 2d 487 (4th Cir. 1980).

There is also precedent which indicates that some provision must be made to ensure that prisoners' have the assistance necessary to file petitions and complaints which will in fact be fully considered by the court. *Johnson v. Avery*, 393 U. S. 483 (1969); *Bounds v. Smith*, 430 U. S. 17 (1977); and *Britt v. North Carolina*, 404 U. S. 226 (1971); also, *Douglas v. Calif.* 372 U. S. 353 (1969).

The ruling in *Shaw v. Martin*, supra., would appear to support the theory that the *first* round of collateral appeals is very important, and as accepted tenet of Due Process. Also, in *Gregg v. Georgia*, 428 U. S. 153 (1976), there is the strong admonition to ensure that every safeguard is observed in all death cases.

I believe I can make a good case under the law to support the basic allegations in my complaint, but fear that it would be a meaningless ritual if my co-plaintiff is executed before I could present my case.

If it is at all possible and proper it would be much appreciated if the Court would lend its guiding hand in this current dilemma. Again, I apologize if this letter is out of order. But, I am truly at a loss as to the proper course to take.

The Honorable Robert R. Merighe
Page Three
August 19, 1985

Respectfully,

/s/ Joseph M. Giarratano
Joseph M. Giarratano

CC:

Office of the Attorney General
101 North Eighth Street
Richmond, Virginia 23219

file

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Richmond, Virginia)

Joseph M. Giarratano
Plaintiff

v.
Allyn R. Sielaff, Dir., et al.,
Defendants

Civil Action No. 85-0655-R

ORDER

On August 21, 1985, this Court received informal correspondence from the plaintiff in this 42 U.S.C. § 1983 action. In his submission, plaintiff largely reiterates the claims made in his original complaint. He also cites legal precedent which he believes might support his case. Plaintiff's letter will be liberally construed as a motion to amend his complaint under Fed. R. Civ. P. 15(2). Because he has submitted his amendment before defendants served their responsive pleading, leave to amend will be GRANTED to plaintiff as "a matter of course." Fed. R. Civ. P. 15(2). The clerk is DIRECTED to send a copy of plaintiff's amendment to defendants.

Defendants are hereby GRANTED ten (10) days within which to file a response to plaintiff's amended pleadings, if they so desire.

And it is so ORDERED.

Let the Clerk send a copy of this order to plaintiff and to counsel for defendants.

/s/ David G. Lowe
United States Magistrate

Dated: Sep 5 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

JOHNNY WATKINS, JR. and
RICHARD T. BOGGS,
each on behalf of himself and all
others similarly situated,
Plaintiffs,

CIVIL ACTION
NO.85-0655-R

**CLASS ACTION
COMPLAINT IN
INTERVENTION**

-against-

GERALD L. BALILES, Governor of the
Commonwealth of Virginia, ROBERT N.
BALDWIN, Executive Secretary of the
Virginia Supreme Court, EDWARD W. MURRAY,
Director of the Virginia Department of
Corrections, and MICHAEL SAMBERG,
Warden of the Virginia State Penitentiary,
in their official capacities,
Defendants.

Plaintiffs, Richard T. Boggs and Johnny Watkins, Jr., by their attorneys, for their complaint, allege, on knowledge as to themselves and otherwise on information and belief, as follows:

NATURE OF THIS ACTION

1. This action is brought as a class action on behalf of all persons, now and in the future, sentenced to death in Virginia, whose sentences have been affirmed by the Virginia Supreme Court and who cannot afford to retain and do not have an attorney to represent them in connection with their petitions to the United States Supreme Court for writ of certiorari or petitions in state and federal courts for writ of habeas corpus ("post-conviction proceedings")

2. Through this action, plaintiffs hope to vindicate a basic constitutional principle: a defendant who has been sentenced to death is entitled to be represented by counsel in post-conviction proceedings challenging his conviction and sentence even if he is too poor to afford a lawyer.

3. Plaintiffs are indigent inmates in Virginia who have been sentenced to death. They wish to petition the United States Supreme Court for writ of certiorari and to file and prosecute state and federal petitions for writ of habeas corpus.

Defendants will not provide or pay for counsel to represent plaintiffs in connection with these post-conviction proceedings. Plaintiffs and other class members will thus be compelled to attempt to proceed *pro se* in the most important litigation of their lives.

4. The practical effect of this refusal to provide or pay for counsel will be the execution of people who have never had an opportunity to be heard by the United States Supreme Court or to challenge their convictions and sentences in habeas corpus proceedings, in violation of their rights under the United States Constitution.

5. As a direct result, the Commonwealth of Virginia (the "Commonwealth") will inevitably execute innocent people and people convicted and sentenced unconstitutionally.

JURISDICTION AND VENUE

6. This Court has jurisdiction to hear this action under 28 U.S.C. §§ 1331 and 1343. This action is brought pursuant to 42 U.S.C. § 1983 and Article I and the First, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

7. Venue is appropriate in this District under 28 U.S.C. §§ 1391 and 1392 in that one or more defendants reside in the District and this is the District in which the claim arose.

THE PARTIES

The Named Plaintiffs and Other Class Members

8. Plaintiff Richard T. Boggs is 23 years old and is currently on death row at the Mecklenburg Correctional Center in Boydton, Virginia. He was convicted of capital murder on July 27, 1984, and sentenced to death on October 25, 1984. The Virginia Supreme Court affirmed his conviction and death sentence on June 14, 1985 and denied his petition for rehearing.

9. At that point, Mr. Boggs was left without a lawyer. A volunteer lawyer was finally located to prepare his petition for writ of certiorari to the United States Supreme Court less than a month before it was due. This lawyer is not, however, able to represent Mr. Boggs in connection with any habeas proceedings. Mr. Boggs has no one to help him prepare and prosecute a petition for writ of habeas corpus and he cannot do so alone.

8. Plaintiff Johnny Watkins, Jr. is 24 years old and is currently on death row at Mecklenburg Correctional Center in Boydton.

He was convicted of capital murder on November 14, 1983 in one trial and sentenced to death on July 13, 1984. Mr. Watkins was convicted of a second capital murder on November 22, 1983 and sentenced to death for that murder on September 28, 1984. The Virginia Supreme Court consolidated the two cases and affirmed the convictions and death sentences on June 14, 1985. The Court denied his petition for rehearing.

9. Like Mr. Boggs, Mr. Watkins was left without an attorney to pursue his post-conviction remedies. Barely a month before Mr. Watkins had to file a petition for writ of certiorari with the United States Supreme Court, a lawyer was finally found who was willing to draft a petition for writ of certiorari only. Mr. Watkins still has no one to represent him with respect to his petitions for writ of habeas corpus and cannot himself prepare such a petition.

10. The conviction and death of Joe Lewis Wise, another death row inmate, was affirmed by the Virginia Supreme Court on November 27, 1985. He is no longer entitled to appointed counsel under current Virginia law, and he cannot afford to retain counsel. An attorney at the NAACP Legal Defense and Educational Fund has agreed to prepare a petition for writ of certiorari to the United States Supreme Court because no one else could be located to assist Mr. Wise. Even though he cannot pursue his post-conviction remedies on his own, no other lawyer is available to represent him in connection with his petitions for writ of habeas corpus.

11. Two other men, Gregory Beaver and Gregory David Frye, have appealed their convictions and sentences to the Virginia Supreme Court. In addition, Coleman Gray has been sentenced to death and will be filing a notice of appeal to the Virginia Supreme Court. If the Virginia Supreme Court affirms their convictions and sentences, Mr. Beaver, Mr. Frye, and Mr. Gray will also be left without lawyers to represent them in connection with petitions for writ of certiorari to the United States Supreme Court and any habeas proceedings. Mr. Beaver, Mr. Frye, and Mr. Gray cannot afford to retain counsel.

12. More individuals will continue to enter the class. If a man on death row cannot afford to retain counsel to help him pursue available post-conviction remedies -- and virtually all capital defendants are indigent -- he will be left alone and

unrepresented once the Virginia Supreme Court affirms his death sentence since, under the current system, defendants will not provide or pay for a lawyer.

Class Allegations

13. This action is properly maintainable as a class action under Rule 23 of the Federal Rules of Civil Procedure.

14. Defendants' refusal to provide or pay for counsel to represent death row inmates in post-conviction proceedings is not only capable of repetition, but is in fact certain to be repeated in the future. Joinder of all members of the class is therefore impracticable.

15. There are questions of law and fact common to the class, including whether defendants are obligated to provide and pay for counsel to represent class members in post-conviction proceedings.

16. The questions of law and fact common to the members of the class predominate over any questions affecting only individual members.

17. The claims of the named plaintiffs are typical of the claims of the class.

18. The named plaintiffs will fairly and adequately protect the interests of the class.

19. A class action is a superior -- and indeed the only available -- method for the fair and efficient adjudication of this controversy.

Defendants

20. Defendant Gerald L. Baliles is the Governor of the Commonwealth of Virginia. Under the Virginia Constitution, he is responsible for the execution of the Virginia laws and policies challenged here.

21. Defendant Robert N. Baldwin is Executive Secretary of the Virginia Supreme Court. He is responsible for administering the state funds allocated for the provision of indigent defense services.

22. Defendant Edward Murray is the Director of the Virginia Department of Corrections. As such, he has legal custody of the members of the plaintiff class.

23. Defendant Michael Samberg is the warden of the State Penitentiary in Richmond, Virginia. He is responsible for carrying out the execution of individuals sentenced to death.

THE CURRENT SYSTEM IN VIRGINIA

24. Defendants currently provide counsel for indigent capital defendants only at trial and on appeal to the Virginia Supreme Court. Following affirmance of a capital murder conviction and death sentence by the Virginia Supreme Court, an indigent death row inmate is no longer, under the current Virginia system, provided with a court-appointed attorney paid by the Commonwealth. Moreover, the Commonwealth may, after the affirmance, execute the inmate at anytime.

25. A death row inmate may not know that, following the disposition of his appeal to the Virginia Supreme Court, he is entitled to petition the United States Supreme Court for writ of certiorari or that he can file a petition for writ of habeas corpus challenging his conviction and sentence. He may not, therefore, know that he can take any further steps to protect his rights prior to his execution.

26. If, however, the indigent death row prisoner is informed that he can institute post-conviction proceedings, his only alternatives are either to proceed *pro se* or to locate an attorney willing to undertake the representation on a *pro bono* basis.

27. Death row inmates are incapable of effectively representing themselves in post-conviction proceedings. Since defendants refuse to provide them with lawyers, indigent death row inmates are thus dependent on volunteers. Nevertheless, it is becoming increasingly difficult -- if not impossible -- to find volunteer lawyers to shoulder the state's obligations. And death row inmates cannot locate volunteer attorneys on their own. The likely result of the present system is, therefore, that people on death row will in the future be executed without having had an opportunity to pursue their post-conviction remedies.

THE IMPORTANCE OF POST-CONVICTION RELIEF

28. On information and belief, nationally, more than 60% of all capital convictions or sentences are reversed either on direct appeal, on certiorari, or pursuant to a writ of habeas corpus. These reversals involve situations in which the person on death row has subsequently been found innocent (or found guilty of a noncapital offense rather than a capital offense) and instances in which the individual has been convicted or sentenced in violation of the United States Constitution. In the Commonwealth, however, 88% of all capital convictions and death sentences are

affirmed on direct appeal. Post-conviction proceedings, therefore, take on added significance.

29. In a capital case, the right to petition the United States Supreme Court for writ of certiorari, together with the appeal to the Virginia Supreme Court, is the primary avenue for direct review of a Virginia capital conviction or death sentence.

30. The right to petition for writ of habeas corpus is a fundamental right under both Virginia and federal law. It is one of the basic protections provided to ensure the reliability and fundamental fairness of capital convictions and sentences.

31. Numerous states recognize the importance of these post-conviction proceedings by providing counsel for such proceedings.

32. The importance of post-conviction review is even greater in Virginia because of the conditions and limitations under which court-appointed counsel are required to function at trial and on direct appeal.

Representation at Trial and on Direct Appeal

33. The compensation paid by the Commonwealth to attorneys appointed to represent indigent defendants in capital murder cases is grossly inadequate. On information and belief, defense counsel are paid an average of \$649 to prepare and try a capital murder case.

34. The effect of the inadequate compensation paid by the Commonwealth is to discourage experienced criminal defense from accepting appointment in capital murder cases, thereby substantially increasing the number of inexperienced attorneys handling those cases.

35. Inadequate compensation also prevents appointed attorneys from providing the quality of representation appropriate to capital murder cases.

The Commonwealth's Procedural Rules on Appeal

36. Because of the Commonwealth's stringent contemporaneous objection rule, a failure by trial counsel to object, to provide reasons for any objection, or to request any form of relief irrevocably waives the point not raised below, and it cannot be raised on appeal to the Virginia Supreme Court, even in a capital case. The inevitable result is that many serious issues, including issues of constitutional dimensions, may be -- indeed have been

-- waived inadvertently at trial by inexperienced and under-compensated trial counsel.

37. The first real opportunity that a death row inmate will have to raise these constitutional issues and any new-found facts will be in the context of post-conviction proceedings.

38. Moreover, claims of ineffective assistance of counsel will not usually be heard on appeal. Such claims will be raised, if at all, only in post-conviction proceedings.

39. At the critical stage of post-conviction proceedings, however, the death row inmate is stripped of counsel. Because he is deprived of legal representation, he may lack the ability and the resources to identify the issues his trial lawyer failed to raise or uncover additional facts.

40. Should a death row inmate attempt to proceed *pro se*, he may prejudice any later attempts to petition for writ of habeas corpus. Virginia Code § 8.01-654(2) states with respect to an initial petition for writ of habeas corpus:

Such petition shall contain all allegations the facts of which are known to petitioner at the time of filing and such petition shall enumerate all previous applications and their disposition. No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition.

If an inmate on death row files a petition *pro se* and omits --through lack of knowledge of the law -- allegations that he could have included, the inmate may be barred from attempting to make those allegations in successive petitions, no matter how meritorious his claims may be.

41. The failure to provide counsel at the post-conviction stage of review therefore deprives death row inmates of representation at what is, in the Commonwealth, one of the most critical and complex stage of all capital murder proceedings. Such a practice is in plain violation of the United States Constitution.

FIRST CLAIM FOR RELIEF

42. Repeats and realleges the allegations of ¶¶ 1-41 as if each were set forth fully herein.

43. The due process clause of the Fourteenth Amendment imposes a requirement of fundamental fairness in the conduct of state criminal proceedings.

44. Fundamental fairness in capital cases requires representation by a lawyer in all post-conviction proceedings because of the inherent complexities of capital cases and the fact that the ultimate outcome is death.

SECOND CLAIM FOR RELIEF

45. Repeats and realleges the allegations of ¶¶ 1-41 as if each were set forth fully herein.

46. The Eighth Amendment prohibits the arbitrary and capricious infliction of the death penalty. It would be an arbitrary and capricious infliction of the death penalty to execute someone who had been deprived of his constitutional rights.

47. Post-conviction proceedings are a vital means of ensuring that the death penalty will not be inflicted in an arbitrary and capricious fashion.

48. The failure to provide counsel for these post-conviction proceedings removes this safeguard, thereby violating the Eighth Amendment.

THIRD CLAIM FOR RELIEF

49. Repeats and realleges the allegations of ¶¶ 1-41 as if each were set forth fully herein in its entirety.

50. The refusal of defendants to provide counsel for post-conviction review of capital convictions and death sentences denies indigent death row inmates their right to equal protection of the laws under the Fourteenth Amendment.

51. The failure to provide counsel means that only those death row inmates who can afford to retain counsel will be able effectively to institute and litigate post-conviction proceedings.

52. The Commonwealth's practice therefore discriminates unconstitutionally on the basis of wealth, in violation of the right to equal protection under the Fourteenth Amendment.

FOURTH CLAIM FOR RELIEF

53. Repeats and realleges the allegations of ¶¶ 1-41 as if each were set forth fully herein.

54. Post-conviction proceedings are critical stages in capital proceedings.

55. The failure to provide counsel at these stages deprives indigent death row inmates of their right to counsel under the Sixth Amendment.

FIFTH CLAIM FOR RELIEF

56. Repeats and realleges the allegations of ¶¶ 1-41 as if each were set forth herein in its entirety.

57. Prisoners have a constitutional right to adequate, effective, and meaningful access to the courts.

58. In a capital murder case, the failure of defendants to provide counsel to indigent death row inmates in connection with post-conviction proceedings is a denial of their right of access to the courts.

SIXTH CLAIM FOR RELIEF

59. Repeats and realleges the allegations of ¶¶ 1-41 as if each were set forth fully herein.

60. The refusal to provide counsel with regard to state and federal petitions for writ of habeas corpus has suspended the writ of habeas corpus in violation of Article I of the United States Constitution.

61. A death row inmate cannot without counsel adequately research and prepare a state petition for writ of habeas corpus.

62. A death row inmate cannot proceed with federal habeas corpus proceedings until he has fully exhausted his remedies under state law, including the state writ of habeas corpus.

63. By refusing to provide counsel for both the state and federal habeas corpus proceedings, defendants effectively bar indigent death row inmates from pursuing their right to petition for a federal writ of habeas corpus.

WHEREFORE, plaintiffs demand judgment against defendants:

(A) Declaring that plaintiffs have a right to be represented by counsel provided or paid for by the Commonwealth in connection with post-conviction proceedings.

(B) Preliminarily and permanently directing defendants to provide to each indigent death row inmate competent and adequately paid counsel to represent him in connection with post-conviction proceedings.

(C) Or, in the alternative, preliminarily and permanently enjoining defendants from executing any indigent inmate on death row who does not have counsel to represent him in connection with his post-conviction proceedings.

(D) Awarding all reasonable attorneys' fees pursuant to 42 U.S.C. § 1988.

(E) Awarding such other and further relief as the Court may deem just, together with the costs and disbursements of this action.

Dated: Richmond, Virginia
February 12, 1986

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

JOSEPH M. GIARRATANO, *et al.*,
Plaintiff,

v. CIVIL ACTION NO. 85-0655-R

ALLYN R. SIELAFF, Director, *et al.*,
Defendants,

and

JOHNNY WATKINS, JR. and
RICHARD T. BOGGS,
each on behalf of himself and all
others similarly situated,

Applicants for Intervention

v.

GERALD L. BALILES, Governor of the
Commonwealth of Virginia, ROBERT N.
BALDWIN, Executive Secretary of the
Virginia Supreme Court, EDWARD W. MURRAY,
Director of the Virginia Department of
Corrections, and MICHAEL SAMBERG,
Warden of the Virginia State Penitentiary,
in their official capacities,

Proposed Defendants.

ANSWER

Come now the defendants, by counsel, and for their Answer to the Class Action Complaint in Intervention say as follows:

1. Defendants say that paragraph 1 of the Class Action Complaint in Intervention (hereinafter referred to as the Complaint) states a legal conclusion not requiring an answer, but to the extent it raises allegations of fact, defendants do not know whether the allegations are true. Defendants deny that this is a proper class action and call upon plaintiffs to prove this allegation.

2. Defendants say that paragraph 2 of the Complaint states a legal conclusion not requiring an answer, but to the extent it is considered a factual allegation, it is denied.

3. Defendants say that they do not know whether the first two sentences of paragraph 3 are true and defendants call upon the plaintiffs for strict proof. Defendants deny the remainder of paragraph 3 of the Complaint.

4. Defendants state that paragraph 4 of the Complaint states a legal conclusion not requiring an answer, but to the extent that factual allegations are made, they are denied.

5. Defendants state that paragraph 5 of the Complaint states a legal conclusion not requiring an answer, but to the extent that a factual allegation is raised, it is denied.

6. Defendants deny that this action is cognizable under 42 U.S.C. § 1983, the Constitution of the United States, and 28 U.S.C. § 1343.

7. Defendants admit paragraph 7 (on page 3) of the Complaint.*

8. Defendants admit paragraph 8 (on page 3) of the Complaint.

9. Defendants do not know whether the allegations of paragraph 9 of the Complaint are true, and call upon the plaintiffs for proof.

10. Defendants admit paragraph 8 (on page 4) of the Complaint.

11. Defendants do not know whether the allegations of paragraph 9 (on page 4) of the Complaint are true, and call upon the plaintiffs for proof.

12. Defendants admit that Joe Wise's conviction was affirmed by the Supreme Court. Defendants do not know whether the allegations of the remainder of paragraph 10 are true, and call upon the plaintiffs for proof.

13. Defendants admit that Gregory Beaver and Gregory David Frye, have appealed their convictions. Defendants do not know whether the allegations of the remainder of paragraph 11 are true, and call upon the plaintiffs for proof.

* The paragraph numbers 8 and 9 are repeated on pages 3 and 4 of the Complaint, but address different allegations.

14. Defendants say that paragraph 12 is a legal conclusion for which no answer is required. To the extent that it raises a factual allegation it is denied.

15. Defendants deny the allegation of paragraph 13 of the Complaint, that this action may be properly maintained as a class action under Rule 23 *Federal Rules of Civil Procedure* and call upon plaintiffs to prove this allegation as required by law and *Federal Rules of Civil Procedure*.

16. Defendants deny the allegations of paragraph 14. Defendants deny that joinder is impracticable.

17. Defendants deny the allegations of paragraph 15.

18. Defendants deny the allegations of paragraph 16.

19. Defendants deny the allegations of paragraph 17.

20. Defendants deny the allegations of paragraph 18.

21. Defendants deny the allegations of paragraph 19.

22. Defendant Gerald L. Baliles admits that he is the Governor of Virginia, but otherwise avers that the Complaint states a legal conclusion for which no response is required.

23. Defendant Robert N. Baldwin admits that he is Executive Secretary of the Supreme Court of Virginia (same as 22).

24. Defendant Edward Murray admits that he is the Director of the Department of Corrections (same as 22).

25. Defendant Michael Samberg admits that he is the warden of the Virginia State Penitentiary (same as 22).

26. Defendants admit that counsel is appointed for an indigent capital defendant for the direct appeal to the Virginia Supreme Court, as alleged in paragraph 24. Defendants state inmates sentenced to death may be executed in the manner provided by state law.

27. Defendants do not know whether the allegations of paragraph 25 are true, and call upon the plaintiffs for strict proof thereof.

28. Defendants deny the allegations of paragraph 26.

29. Defendants state that paragraph 27 states legal conclusions not requiring an answer, but to the extent that factual allegations are made, they are denied.

30. Defendants do not know whether the factual allegations of paragraph 28 are true, and call upon plaintiffs for strict proof thereof. Defendants deny that post-conviction proceedings take on added significance in the Commonwealth.

31. Defendants state that paragraph 29 is a legal conclusion not requiring an answer, but to the extent that a factual allegation is presented, it is denied.

32. Defendants say that paragraph 30 is a legal conclusion for which an answer is not required, but to the extent a factual allegation is presented, it is denied.

33. Defendants do not know whether the factual allegations of paragraph 31 are true and call upon the plaintiffs for strict proof thereof.

34. Defendants state that the allegations of paragraph 32 state a legal conclusion for which an answer is not required, but, to the extent that a factual allegation is presented, it is denied.

35. Defendants state that the allegations of paragraph 33 that compensation is inadequate present a legal conclusion for which no answer is required. To the extent such allegations contain factual averments, the same are denied. Defendants do not know whether the remainder of paragraph 33 is true and call upon plaintiffs for strict proof thereof.

36. Defendants state that paragraph 34 presents legal conclusions for which no answer is required, but to the extent that it may be considered a factual allegation, it is denied.

37. Defendants state that paragraph 35 presents a legal conclusions for which no answer is required, but to the extent that it may be considered a factual allegation, it is denied.

38. Defendants state that paragraph 36 presents a legal conclusions for which no answer is required, but to the extent that it may be considered a factual allegation, it is denied.

39. Defendants state that paragraph 37 presents a legal conclusions for which no answer is required, but to the extent that it may be considered a factual allegation, it is denied.

40. Defendants state that paragraph 38 presents a legal conclusions for which no answer is required, but to the extent that it may be considered a factual allegation, it is denied.

41. Defendants state that paragraph 39 presents a legal conclusion for which no answer is required, but to the extent that it may be considered a factual allegation, it is denied.

42. Defendants state that paragraph 40 presents a legal conclusion for which no answer is required, but admits that Virginia Code §8.01-654(B)(2) is accurately quoted.

43. Defendants state that paragraph 41 presents legal con-

clusions for which no answer is required, but to the extent that it is considered as raising factual allegations, it is denied.

44. Defendants state that paragraphs 43-44 present legal conclusions not requiring a response, but to the extent they may be considered as raising factual allegations they are denied.

45. Defendants state that paragraphs 46-48 present legal conclusions not requiring a response, but to the extent that they are considered as raising factual allegations they are denied.

46. Defendants state that paragraphs 50-52 present legal conclusions not requiring a response, but to the extent that they are considered as factual allegations, they are denied.

47. Defendants state that paragraphs 54-55 present legal conclusions not requiring a response, but to the extent factual allegations are presented, they are denied.

48. Defendants state that paragraphs 57-58 present legal conclusions not requiring a response, but to the extent a factual allegation is presented, it is denied.

49. Defendants state that paragraphs 60-63 present legal conclusions not requiring a response, but to the extent a factual allegation is presented, it is denied.

50. Defendants deny that plaintiffs are entitled to any relief against defendants.

FIRST DEFENSE

Defendants incorporate herin, as if set forth in full at this point, each and every contention raised in their Response to Motion for a Preliminary Injunction and Motions for Summary Judgment previously filed with this Court.

SECOND DEFENSE

Defendants submit that the Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

Defendants deny that the plaintiffs have been denied any right protected by the United States Constitution, any federal law, or any other law.

FOURTH DEFENSE

Defendants deny that the present action is cognizable under 42 U.S.C. § 1983, the Constitution of the United States, and 28 U.S.C. § 1343. Further, these defendants deny that any of their

acts and/or omissions constitute state action or acts or omissions under color of state law. Defendants deny that proper parties are before this Court, and aver that this suit is designed to circumvent normal appellate and habeas corpus procedures to challenge any discretionary denial of counsel in habeas corpus or appellate proceedings, and should proceed, if at all, by way of habeas corpus.

FIFTH DEFENSE

Defendants deny that the plaintiffs have suffered or are threatened with any cognizable injury or damage as a result of any acts or omissions on the part of these defendants.

SIXTH DEFENSE

Defendants allege and aver that, to the extent that the plaintiffs have suffered any deprivation, injury or damage, such deprivation, injury or damage was due to acts or omissions of the plaintiffs or of others not under the control of the defendants, and for whose conduct they are not responsible in law.

SEVENTH DEFENSE

Defendants deny that plaintiffs have suffered any injury or damage alleged and call for strict proof thereof.

EIGHTH DEFENSE

Defendants deny that they are indebted to or liable to the plaintiff in any sum whatsoever.

NINTH DEFENSE

Defendants submit that they enjoy immunity from suit and/or liability to the plaintiff.

TENTH DEFENSE

Plaintiffs are possessed of adequate state remedies and have not suffered nor are threatened with any deprivation without due process.

ELEVENTH DEFENSE

Defendants submit that equitable and declaratory relief is barred because of mootness, adequacy of available legal remedies, the lack of an immediate threat of irreparable harm or threat of repetition of the alleged acts, the facts that only isolated acts and/or omissions are alleged, and the lack of any justiciable case or controversy and lack of standing.

TWELFTH DEFENSE

With respect to the specific allegations set forth in the Complaint, these defendants state as follows:

a. Defendants deny that they are authorized or empowered to appoint counsel to represent indigent inmates and deny that any such appointment is constitutionally required under the circumstances of this case. Defendants aver that adequate legal resources are provided prisoners including law libraries and court-appointed attorneys at the prisoner's institution. Defendants further aver that adequate and ample procedures and resources exist to raise and determine any questions concerning the competency or disability of inmates. Defendants further aver that authority to appoint attorneys to represent indigent prisoners lies with federal judges in federal appellate or habeas corpus proceedings and with state judges in state habeas corpus proceedings.

b. Defendants deny that the plaintiffs suffered any injury, damage, or deprivation as a result of their acts.

c. Defendants deny that at any time they violated any of the procedures of the Virginia Department of Corrections, and deny that they failed to provide the plaintiffs with due process, the equal protection of the laws, or access to the courts.

d. Defendants deny all allegations contained in plaintiff's Complaint insofar as they may pertain to them and will require strict proof thereof except as specifically admitted herein.

e. Defendants allege and aver that at all relevant times proper procedures were employed relative to the plaintiffs and that the plaintiffs were properly dealt with.

f. Defendants deny that they failed to comply with any applicable standard of care in their dealings with the plaintiffs.

g. Defendants allege and aver that at all relevant times they acted in a reasonable and lawful manner without malice and indifference, and in good faith discharged any duties they may have owed to the plaintiffs.

h. Defendants deny all allegations not expressly admitted herein.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

JOSEPH M. GIARRATANO, et al.,)
 Plaintiffs,)
v.) Civil Action No.
EDWARD W. MURRAY, et al.,) 85-0655-R
 Defendants.)

ORDER

For the reasons stated in the accompanying memorandum entered this day, and deeming it proper so to do, it is ADJUDGED and ORDERED that plaintiff's motion for class certification is hereby GRANTED.

The class so certified shall consist of all persons, now and in the future, sentenced to death in Virginia, whose sentences have been or are subsequently affirmed by the Virginia Supreme Court and who either (1) cannot afford to retain and do not have attorneys to represent them in connection with their post-conviction proceedings, or (2) could not afford to retain and did not have attorneys to represent them in connection with a particular post-conviction proceeding.

Let the Clerk send a copy of this order and the accompanying memorandum to all counsel of record.

/s/ Robert R. Merhige, Jr.

UNITED STATES DISTRICT JUDGE

Date: May 29 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

JOSEPH M. GIARRATANO, et al.,)
 Plaintiffs,)
v.) Civil Action No.
) 85-0655-R
EDWARD W. MURRAY, et al.)
 Defendants.)

MEMORANDUM

The Plaintiffs in this suit are indigent inmates currently incarcerated on death row in the Commonwealth of Virginia. These inmates contend that the Commonwealth is constitutionally required to provide them with counsel to represent them in post-conviction proceedings. The particular matter presently before the Court is plaintiffs' motion for class certification. The proposed class is defined by the plaintiffs as "all persons, now and in the future, sentenced to death in Virginia, whose sentences have been affirmed by the Virginia Supreme Court and who cannot afford to retain and do not have attorneys to represent them in connection with their post-conviction proceedings." The Court finds that the definition of the proposed class should be modified to include those present and future death row inmates who desired to have counsel to represent them in a particular post-conviction proceedings but were unable to obtain such counsel.¹ The Court concludes that certification of such a class would be appropriate, for the class meets the requirements set forth in Rule 23 of the Federal Rules Civil Procedure; moreover, a class action would be the most efficient and convenient manner in which to litigate the issue raised by the instant suit.

¹ This would include, for example, those indigent death row inmates who wished to have counsel to assist them in the preparation of a petition to the Supreme Court for a writ of certiorari, but were unable to obtain counsel prior to the expiration of the time limit for the filing of such a petition.

Merits

A class action may be maintained only if the class meets each of the four prerequisites set forth in the Rule 23 of the Federal Rules of Civil Procedure 23 (a) and fits into at least one of the three categories described in Rule 23 (b). A district court has broad discretion in determining whether a class action may be maintained. See, e.g., *Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984); *Roman v. ESB, Inc.*, 550 F.2d 1343, 1348-49 (4th Cir. 1976). In analyzing plaintiffs' motion for class certification, the Court will discuss, first, whether the proposed class meets the requirements of Rule 23 (a), second, whether the proposed class falls into any of the categories set forth in Rule 23 (b) and, third the practical considerations that favor certification of the proposed class.

1. Rule 23 (a)

Rule 23 (a) establishes four prerequisites that must be met before a class action may be maintained. These prerequisites are:

1. the class is so numerous that joinder of all members is impracticable,
2. there are questions of law or fact common to the class,
3. the claims or defenses of the representative parties, are typical of the claims or defenses of the class, and
4. the representative parties will fairly and adequately protect the interest of the class.

The Court will address each of these elements in turn.

At first glance, the proposed class would not appear to satisfy the requirement that the class be so numerous as to make joinder impracticable for there are at present only three identifiable members of the proposed class: the named plaintiffs -- Johnny Watkins, Jr. and Richard J. Boggs -- and one other death row inmate -- Joe Louis Wise. All of the other inmates currently on death row are apparently represented by counsel in their post-conviction proceedings.

The class proposed here, however, includes not only those death row inmates who are currently unrepresented by counsel, but also all future indigent death row prisoners whose convictions have been affirmed by the Virginia Supreme Court and who desire attorneys to represent them in their post-conviction

proceedings.² Joinder is inherently impracticable, when as here, a class includes future members. See, e.g., *Phillips v. Joint Legislative Committee on Performance and Expenditure Review*, 637 F.2d 1014, 1022 (5th Cir 1981), cert. denied, 456 U.S. 960 (1982); *Young v. Pierce*, 544 F. Supp. 1010, 1028-29 (E.D. Tex. 1982); *Hendrix v. Faulkner*, 525 F. Supp. 435, 442-43 (N.D. Ind. 1981), modified on other grounds, 715 F.2d 269 (7th Cir. 1983), cert. denied, 104 S.Ct. 3587 (1984); *Holland v. Steele*, 92 F.R.D. 58, 63 (N.D. Ga. 1981)

In addition to the existence of future class members, the impracticability of joinder in the instant case is further magnified by the shifting nature of the proposed class. The trial of this matter will take place in the reasonably near future -- on July 10 and 11, 1986. It is unlikely that the composition of the class will change dramatically, if at all, prior to such trial. It may be assumed, however, that the decision ultimately rendered by this Court will be appealed to the Court of Appeals for the Fourth Circuit, and, quite possibly to the Supreme Court of the United States. The exhaustion of this appeals procedure could therefore conceivably take several years. It is quite likely that, within this period of time, there will be a great deal of movement, both into and out of the class. People will move into the class when they are convicted of capital offenses, sentenced to death and have their appeals denied by the Virginia Supreme Court. Conversely, people will move out of the class for various reasons, such as success on their post-conviction appeals or, perhaps, execution. The Court finds that this movement of persons into and out of the class, combined with the existence of future class members, would make joinder impracticable in the instant case. Accordingly, the Court finds that plaintiffs have satisfied the first prerequisite set forth in Rule 23 (a).

² The inclusion of future indigent death row inmates in the proposed class is appropriate, for the Commonwealth has stated that it does not intend to voluntarily provide counsel to indigent death row inmates in the future. See, e.g., *Young v. Pierce*, 544 F. Supp. 1010, 1028 (E.D. Tex. 1982); *Hendrix v. Faulkner*, 525 F. Supp. 435, 442 (N.D. Ind. 1981), modified on other grounds, 715 F.2d 269 (7th Cir. 1983), cert. denied, 104 S.Ct. 3587 (1984); *Inmates of Lycoming County Prison v. Strobe*, 79 F.R.D. 228, 231 (M.D. Pa. 1978).

The proposed class also clearly satisfies Rule 23 (a)'s remaining prerequisites. First, there are questions of law or fact common to all members of the class. This class, as defined, would consist of those current and future indigent death row inmates who desire the representation of counsel in their post-conviction proceedings. The sole legal issue to be determined is whether the Commonwealth of Virginia is constitutionally required to provide counsel for such inmates. Accordingly, the relevant legal and factual issues will be essentially identical for each member of the class.

Second, the claims or defenses of Watkins and Boggs, the putative class representatives, are typical of the claims or defenses of the proposed class. Both Watkins and Boggs are currently on death row, have had their convictions affirmed by the Virginia Supreme Court, desire counsel to represent them in their post-conviction proceedings and are too poor to be able to afford such counsel. Therefore, for the purposes of the instant suit, Watkins' and Boggs' claims are typical of those of the proposed class.

Finally, Watkins and Boggs will fairly and adequately protect the interests of the class. Plaintiffs' counsel are clearly qualified to conduct the proposed litigation. Moreover, plaintiffs have a substantial interest in the results of this litigation for it is quite literally a matter of life and death to them. Finally, plaintiffs have no interests antagonistic to or conflicting with those of any other members of the proposed class and plaintiffs' interests are coextensive with those of the other class members. *See* 7 C. Wright & A. Miller, *Federal Practice and Procedure*, Civil §§ 1766-69.

The Court therefore finds that the proposed class satisfies the prerequisites set forth in Rule 23 (a). Accordingly, it must next be determined whether the class fits into any of the three categories described in Rule 23 (b).

2. Rule 23 (b)

Plaintiffs contend that the proposed class meets the requirements of Rule 23 (b) (2). This subdivision provides that a class action may be maintained if:

the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making

appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Plaintiffs clearly satisfy this subdivision, for it is undisputed that the Commonwealth has refused to provide counsel to assist indigent death row inmates in their post-conviction proceedings. Moreover, the Commonwealth has unequivocally asserted in the instant proceeding that it has no constitutional obligation to provide counsel in such situations. Accordingly, the Court finds that plaintiffs have established that the proposed class may be maintained pursuant to Rule 23 (b) (2).

3. Practical Consideration

In addition to the fact that the proposed class meets requirements set forth in Rule 23, certification of such a class is supported by a weighty practical consideration, namely the possibility that the issue raised in the instant suit, if not asserted through the vehicle of a class action, might never be fully litigated due to the possibility of mootness.

As noted above, *see supra*, pp. 3-4, it may well be several years before the instant litigation is finally concluded. By that time, it is quite likely that the claims of the current named plaintiffs, Watkins and Boggs, will have become moot, either due to success of a post-conviction petition or to execution. This same problem would be present no matter who the particular plaintiff was. A class action may therefore be the only mechanism by which a final decision on the merits of this issue may be obtained. Certification of the class would therefore be prudent. *See, e.g., Johnson v. City of Opelousas*, 658 F.2d 1065, 1069-70 (5th Cir. 1981); *Greklek v. Toia*, 565 F.2d 1259, 1261 (2d Cir. 1977); *Adams v. Califano*, 474 F. Supp. 974, 979 (D.MD. 1979), *aff'd sub. nom., Adams v. Harris*, 643 F.2d 995 (4th Cir. 1981).

Accordingly, because the proposed class meets the requirements set forth in Rule 23, and because a class action appears to be the most desirable method by which to litigate the issue raised by the instant case, plaintiffs' motion for class certification shall be granted.

An appropriate order shall issue.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date May 29, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Joseph M. Giarratano, et al.,
Plaintiffs,

v.

Civil Action No. 85-0655-R

Edward W. Murray, et al.
Defendants

ORDER

For the reasons stated in the accompanying memorandum entered this day, and deeming it proper so to do, it is ADJUDGED and ORDERED that defendants' motion for summary judgment be and the same is hereby DENIED.

Let the Clerk send a copy of this order and the accompanying memorandum to all counsel of record.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date: July 8 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Joseph M. Giarratano, et al.,
Plaintiffs,

v.

Edward W. Murray, et al.
Defendants

Civil Action No. 85-0655-R

MEMORANDUM

The plaintiffs in this matter, a class consisting of certain present and future death row inmates, have filed suit against various officials of the Commonwealth of Virginia. Plaintiffs contend that they have a constitutional right to the assistance of State-appointed counsel in their post-conviction proceedings. The matter presently before the Court is defendants' motion for summary judgment. This motion has been fully briefed and argued and is therefore ripe for disposition.

Merits

The Court concludes that summary judgment would be inappropriate, as the following material facts are in dispute:

1. whether death row inmates are capable of adequately representing themselves in post-conviction proceedings;
2. whether the assistance currently provided by the State to death row inmates in post-conviction proceedings is adequate; and
3. whether State-appointed counsel would help death row inmates pursue their post-conviction remedies more effectively.

The Court does not hold that resolution of these factual issues in plaintiffs' favor would necessarily mandate judgment for plaintiffs on each of their constitutional claims. The Court does find, however, that it would be prudent to defer judgment on each of these issues until after the matter has been fully tried.

The Court would also like to express its concerns regarding some of the issues involved in the instant case in the hope that the parties will address them at trial:

1. *Federal Proceedings* — The Court has serious doubt as to whether the State should be required to provide counsel to assist death row inmates in post-conviction proceedings in *federal* court. The Supreme Court noted the distinction between federal

and state court proceedings in *Ross v. Moffitt*, 417 U.S. 600 (1974):

There is also a significant difference between the source of the right to seek discretionary review in the Supreme Court of North Carolina and the source of the right to seek discretionary review in this Court. The former is conferred by the statutes of the State of North Carolina, but the latter is granted by statute enacted by Congress. Thus the argument relied upon in [*Griffin v. Illinois*, 351 U.S. 12 (1956) and *Douglas v. California*, 372 U.S. 353 (1963)], that the State having once created a right of appeal must give all persons an equal opportunity to enjoy the right, is by its terms inapplicable. The right to seek certiorari in this Court is not granted by any State, and exists by virtue of federal statute with or without the consent of the State whose judgment is sought to be reviewed.

The suggestion that a State is responsible for providing counsel to one petitioning this Court simply because it initiated the prosecution which led to the judgment sought to be reviewed is unsupported by either reason or authority.

417 U.S. at 617.

The apparent logic of placing responsibility on the federal government for proceedings in federal court and on state government for proceedings in state court is illustrated by the current practice in federal and state habeas actions. Federal law currently provides for appointment of counsel in certain federal habeas proceedings, while Virginia law provides for State-appointed counsel in certain instances in habeas proceedings in Virginia state court.

The reasoning enunciated in *Ross*, however, may have been implicitly rejected by the Supreme Court in *Bounds v. Smith*, 430 U.S. 817 (1977). The Court held in *Bounds* that the constitutional right of access to the courts required that prison officials assist inmates in the preparation and filing of legal documents by providing such inmates with either law libraries or assistance from persons trained in the law. This right to state assistance applies to proceedings in federal, as well as state, court. *Bounds* did not, however, explicitly discuss the justification for requiring

states to provide assistance to inmates in federal court proceedings.

Even assuming, however, that it would be permissible to require states to provide counsel to death row inmates in federal court proceedings, it may be that the need for counsel is generally somewhat less in federal actions than in state actions. In *Ross v. Moffitt*, *supra*, the Supreme Court, in finding that there was no right to appointment of counsel in a proceeding for discretionary review before the North Carolina Supreme Court, noted that an inmate would by that stage of the proceedings have "a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case." 417 U.S. at 615. Similarly, the Court justified its decision in *Bounds v. Smith*, *supra*, in part by noting that the claims presented in the proceedings at issue — civil rights actions and habeas corpus proceedings — would be claims that had not previously been litigated. 430 U.S. at 827.

Application of the above principle to the instant situation would seem to indicate that, in most instances, there is less of a need for the assistance of appointed counsel in the preparation of a petition for review in federal court than in state court. A petition for a writ of certiorari to the Supreme Court of the United States would necessarily involve an issue previously decided by a state court. Similarly, given the requirement in federal habeas proceedings of exhaustion of state remedies, most issues that could be considered on a federal habeas petition would have already been submitted to and decided by a state court. Accordingly, because most of the issues that could be presented in federal court proceedings would have previously been presented to a state court, an inmate would already have a trial transcript, a brief and, in most instances, a written opinion at his disposal. It would therefore appear that, on the whole, the need for appointed counsel would not be as great in federal proceedings as in state proceedings. The difficulty, however, is that there may be no way to determine in advance of appointment of counsel whether a claim which has not previously been litigated in state court could and should be raised in a federal habeas petition.

2. *Sixth Amendment* — Plaintiffs contend that they need

the assistance of appointed counsel in post-conviction proceedings to effectuate their Sixth Amendment right to effective assistance of counsel. This claim appears at first glance to be somewhat anomalous, for the Sixth Amendment right to counsel applies only to trials. Plaintiffs' claim is therefore that the constitutional right to counsel at trial carries with it the right to counsel *in a later proceeding* to challenge the effectiveness of trial counsel. The Court is unaware of any other instance in which a constitutional right, such as freedom of speech or freedom of religion, has been held to include the right to state-appointed counsel to challenge the denial of such a right.

Plaintiffs contend, however, that appointed counsel is particularly necessary to effectuate the Sixth Amendment right to counsel because only an attorney can effectively assess whether this right has been denied. This position has some support in the Supreme Court's recent decision in *Kimmelman v. Morrison*, No. 84-1661 (June 26, 1986). The Court, in holding that the restriction on federal habeas review of Fourth Amendment claims does not extend to Sixth Amendment claims of ineffective assistance of counsel, noted as follows:

Because collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation. *A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance . . . consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case.*

Slip op. at 11 (emphasis added) (citation omitted).

The above excerpt clearly indicates that the Supreme Court has recognized the value of an attorney in the prosecution of a claim of ineffective assistance of counsel. It does not appear to this Court, however, that *Kimmelman* necessarily holds that the Sixth Amendment *itself* requires appointed counsel to pursue a claim of ineffective assistance. Moreover, even if claims of ineffective assistance are difficult for laymen to prosecute, it would

not seem that *all* ineffective assistance claims are necessarily more difficult than *all* other constitutional claims.

In addition, even if there was a constitutional right to counsel to challenge the effectiveness of trial counsel, counsel are in fact now provided in certain circumstances by the Commonwealth of Virginia. In 1985, Virginia enacted a statute providing that "[a] claim of ineffective assistance of counsel may be raised on direct appeal if assigned as error and if all matters relating to such issue are fully contained within the record of the trial." Va. Code § 19.2-317.1. As appointed counsel is provided on direct appeal, inmates do in fact currently receive in many circumstances precisely what plaintiffs request in the instant case — appointed counsel to challenge the effectiveness of trial counsel. There do, however, appear to be two difficulties with § 19.2-317.1; first, the only claims that may be raised are those which may be assessed solely by reference to the trial record and, second, there is some question as to whether it is realistic to expect that a claim of ineffective assistance will be raised effectively if counsel on direct appeal was also counsel at trial. *See, e.g., Kimmelman v. Morrison, supra*, slip op. at 10 ("an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings, particularly if he retained trial counsel on direct appeal").

Finally, even assuming that there is a Sixth Amendment right to counsel in post-conviction proceedings, such a right would necessarily only support appointed counsel to assist inmates in the preparation and presentation of claims for ineffective assistance of counsel, and not for any other claims that an inmate may wish to pursue.

3. *Appropriate Remedy* — The Court also has some question as to whether, even if it finds that the amount of assistance currently provided to death row inmates by the State is inadequate, individual appointed counsel for each inmate is constitutionally required. It may be that the State can satisfy its constitutional obligations with steps short of providing individual counsel to every death row inmate.

As stated above, the Court would appreciate the comments of counsel in regard to the above issues.

An appropriate order shall issue.

/s/ Robert R. Merhige, Jr.

UNITED STATES DISTRICT JUDGE

Date: July 8 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TESTIMONY OF JOHN CHARLES BOGER

July 10, 1986

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(Witness Sworn.)

John Boger testified as follows:

Direct Examination

By Mr. Landers:

Q. Mr. Boger, would you state your name?

A. John Charles Boger.

Q. What is your occupation, sir?

A. I am an attorney.

Q. What Bars are you a member of?

A. I am a member of the Bar of the State of New York, of the Bars of the Second, Fourth, Fifth and Eighth, Tenth, and Eleventh Circuits and the Bar of the Supreme Court of the United States.

THE COURT: I want you to be comfortable. Don't worry about looking toward me, but move the mike so everybody can hear you without difficulty.

Q. When were you admitted to the first of the Bars that you have just mentioned?

A. In 1975.

Q. When did you graduate from law school, Mr. Boger?

A. A year earlier, in 1974.

Q. What law school did you graduate from?

A. The University of North Carolina.

Q. Do you hold any other post graduate degrees, sir?

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A. Yes, I have a Master of Divinity degree from the Yale Divinity School.

Q. Are you currently employed, Mr. Boger?

A. I am.

Q. Where are you employed?

A. At the N. A. A. C. P. Legal Defense and Educational

Fund in New York City.

Q. How long have you been employed at, shall we call it the Legal Defense Fund for this proceeding, how long have you been employed at the Legal Defense Fund?

A. Since 1978.

Q. Could you tell the court exactly what the Legal Defense Fund is?

A. Legal Defense Fund is an organization established in 1939 to assert and defend the rights of black persons, primarily through litigation.

Q. What is your position at the Legal Defense Fund?

A. I am Assistant Counsel with the Capital Punishment Project of the Fund.

Q. What are your duties as Assistant Counsel?

A. The Capital Punishment Project is involved in the defense of capital inmates. We really have four basic responsibilities.

We defend inmates directly. We recruit lawyers to defend other inmates.

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We do research into social science issues related to capital cases and litigation issues.

And we provide information to the public, and lecture and train lawyers.

Q. You mentioned, Mr. Boger, that the Capital Project represents inmates. Does it represent all inmates that need representation?

A. No, not at this point.

Our initial founding idea was to provide representation to everyone under sentence of death in state and federal post conviction proceedings.

At this point, though, there are 18 hundred people on death row, and our staff is roughly two and a half full time lawyers, so obviously we can't ourselves provide that representation directly.

Q. When did the legal defense fund first begin to represent capital defendants?

A. Well, in a systematic way we first began in the mid

1960's. Took on representation in 1965 and '6 and '7 of a lot of inmates.

Over the years initially we organized ourselves to represent many of those inmates and obtained volunteer services of other attorneys. But as time has passed and the number has grown greater, really our direct control or even secondary control over those efforts had diminished.

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THE COURT: I want to be sure I didn't misunderstand you. You said there were 18 hundred, is that what you said?

A. Roughly, that is correct. We keep a bi-monthly count, our May 1 count was some 1714, and I think through natural attrition we are up to about 18 hundred at this point, Your Honor.

THE COURT: Are these people who have already been sentenced?

A. That is correct. These are death sentenced inmates.

Q. Mr. Boger, you mentioned in response to my question that you attempt to arrange representation, recruit volunteer attorneys for other inmates. How do you do that, sir?

A. Well, obviously, we take some of the cases ourselves. In many states, particularly after the Gregg Decision in 1876 we assumed responsibility for the cases that were moving into state and federal post conviction proceedings. But rapidly our own ability to deal with those cases within our offices came to an end.

At that point we initially looked for lawyers ourselves who would volunteer in the various states to handle these cases.

Very soon the numbers of death sentenced inmates outgrew our ability simply to serve that retail function, if you will, of locating those lawyers.

So we came to rely upon volunteers in each state who

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themselves became state wide coordinators of volunteers, as Marie Deans is in this state. At this point, what we do primarily is work with those state coordinators and occasionally provide them with counsel outside the state when they run out of local

lawyers who are available to handle a capital matter.

In other words, we will go to New York or to Chicago or to the District of Columbia and ask a large law firm if they will take a Virginia case or a South Carolina case because at that time their not local counsel who can handle the matter.

THE COURT: Well you are talking about when you say take the case, you are talking about post conviction relief aren't you.

A. That is correct, Your Honor. We really primarily step in where Gideon V. Wainwright leaves off after the direct appeal is over. Sometimes the lawyers will drop out of the case prior to the filing of a petition for certiorari. Sometimes they will, the trial lawyers will assume that responsibility through certiorari and then drop out of the case.

In the majority of cases, trial lawyers do not continue in the state or federal post conviction proceedings.

Q. Mr. Boger, you also mentioned that the Legal Defense Fund collects certain types of information with respect to

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capital cases. What kinds of information does the Legal Defense Fund collect?

A. We gather the names of everybody under sentence of death by state with information on their date of conviction, their race, their sex, their attorney's names and addresses. Until recently we were able to get fairly comprehensive information on the constitutional issues they were asserting in their cases. The numbers simply overwhelmed our ability to do that successfully any more.

Q. What is the purpose for collecting this data?

A. Well, there are several purposes. Our primary aim, as I indicated, was to insure that everyone had counsel in state and federal post conviction proceedings. Obviously you have to know who the defendants under sentence are in order to begin that process.

You also need the addresses and telephone numbers of their lawyers to keep you up to date to find out whether in fact they are going to continue to represent these people.

We have also found the data is useful for a variety of

other purposes connected with capital cases, for example, examinations of whether race and sex are playing a part, and who receives the death penalty.

Q. How does the Legal Defense Fund go about collecting the data that you just mentioned?

A. Well, we call and have established I guess over the

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years regular relationships with officials in each state with capital punishment. In some states the wardens of the prisons, in other states a State Department of Corrections. There are states, for example like Pennsylvania, where you simply have to call around to county jails because people are being held in county jails and not in one central facility.

We also have come to rely heavily on the volunteer of personnel such as in this state Marie Deans, who themselves are trying to keep that information on a state wide basis.

Q. Do you yourself play any role in the data collection process, Mr. Boger?

A. I directly supervise our Director of Research. We have a one-person Department of Research, and I work with them daily.

Q. Now, Mr. Boger, have you personally represented any death row inmate in a capital case?

A. Yes.

Q. How many inmates have you represented?

A. Probably as counsel of record between 60 and 80 persons in post conviction proceedings, state or federal.

Probably have assisted in a serious way, helped to write a brief or moot an oral argument in two or three hundred more.

Q. In what courts have you appeared on behalf of death row inmates?

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A. Virtually every post conviction court, certainly not in every state, but I have appeared in state post conviction trial level and Appellate Courts and in Federal District Court, Federal Courts of Appeals, U.S. Supreme Court, and in a number of

states, primarily in the south.

Q. Have you taught any courses in death penalty or post conviction law?

A. Yes, I have.

Q. Could you describe those courses for us?

A. Well, I have taught probably 20 or 30 one or two-day seminars to lawyers in different states throughout the country, primarily on the substantive law of capital punishment or federal and state habeas corpus proceedings.

In January of 1985 and throughout the spring I taught two courses at the Harvard Law School in capital punishment litigation. I am currently on the faculty of New York Law School as an adjunct professor to teach a course this coming academic year in capital punishment litigation.

Q. In your experience, Mr. Boger, what is the practical importance of post conviction proceedings to an inmate?

A. We found there is a very serious practical import. That in the last decade or so well over half of all inmates who have pursued post conviction proceedings have obtained relief either from their conviction or their death sentence or both. At the time of the Barefoot v. Estelle Case, which

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was litigated in the Supreme Court in the 1982 term of that court, we submitted an amicus brief showing that some 68 to 70 percent of all capital inmates who reached the Federal Courts of Appeals since 1976 had obtained some sentencing or guilt relief. The numbers have fallen some since then, but my estimate is still that over 40 percent of the capital inmates are receiving relief in the federal courts. Of course, there are others that received relief in the state post conviction courts as well.

Q. In your experience, Mr. Boger, what tasks should a diligent and knowledgeable attorney perform in representing a death row inmate in post conviction proceedings? Could we start, if you would, with the period immediately after the direct appeal.

A. All right. May invariable practice and recommendation is that a lawyer file a petition for certiorari with the Supreme

Court of the United States in a capital case, for a number of reasons, not the least of which is that the Supreme Court appears unduly receptive to capital cases as compared to other criminal or even civil cases. This past term they took nine capital cases in their slender docket of 150.

THE COURT: you don't mean unduly, do you?

Q. I was about to inject, but I thought the witness would--

A. I think you are right. Unduly is a term I would disavow in that regard. Appropriate interest in capital

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cases. But it is striking where the Supreme Court normally grants just a minor fraction of cases, the number of capital cases that receive consideration is considerable, and we are told in fact that every capital cert. petition is put on the discuss list of the Justices, the list of cases they actually discuss at conference. So certiorari would certainly be the first step.

Q. What is involved in preparing a petition for certiorari? Is it merely repeating appellate arguments given below?

A. Well, no, but the jurisdiction of the court is limited to issues that have been raised and decided below.

The consideration that govern the court's grant of certiorari, of course, are somewhat different. The court is interested in whether there were conflicts that have developed in this particular case between pronouncement on the issue of constitutional law and that that other state or federal courts have pronounced on the same principle, interested in whether that might be some part of doctrinal departure. It is interested in furthering or retarding by a grant of certiorari, so one has to look beyond the merits of the issue to see the constitutional issue in the context of developing law. Either with respect to other states or the doctrinal development itself.

And prepare a petition that points those features of

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the case out to the Justice.

Q. How long would it customarily take an able and diligent

attorney to prepare such a petition?

A. If we assume that a lawyer is entering the case at that point, obviously the record needs to be read, and that can take anywhere from ten to 30 hours. And then myself, I would say I have never prepared a petition in less than two or three days of work, of 18 to 25 additional hours. I think a lawyer who is less experienced in supreme court practice might take longer.

Q. Does that 18 to 20 odd hours that you have just described include library research as well as drafting the document itself?

A. No, actually the library research might be additional work.

Particularly if a lawyer is not familiar with how the issues that are being presented fit into this doctrinal context or the circuit wide and nation wide context additional legal research is needed.

THE COURT: Really isn't any different than any other matter that you seek cert. Except for the importance of it, of course.

Doesn't it depend on the experience of the attorney?

A. Of course.

THE COURT: All of those factors.

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A. Of course, Your Honor. There of course is a developed body of 8th amendment juris prudence in capital cases, that means even an experienced criminal lawyer often has to do a lot of additional work.

THE COURT: But Arthur Miller probably doesn't take as much time as Charlie Wright.

A. I am not sure I would speculate as between those two, but I am sure that some lawyers --

THE COURT: I didn't mean to infer he is more efficient, but when you deal with people like that it doesn't take Professor Wright or Miller as much time as it would me.

A. Again, I would hesitate to guess as between the two of you, Your Honor.

THE COURT: We would come out even. You are

right, certainly right. Some lawyers are far better prepared to undertake the task quickly, and others it will take more time and preparation.

Q. If I understand your testimony, Mr. Boger, even the best prepared attorney simply doesn't sit down and jot off a petition for certiorari?

A. Not if they hope to get it granted. I mean, I have done no cert. petition that is remotely adequate, as I have said, in less than two or three days.

THE COURT: Have you ever done one that you didn't think you could have done better on the way home after filing

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it?

A. Rarely. I would have to think a long time.

But, unfortunately in capital cases we have gotten involved at the very last moment on the 89th day or 59th when we just found out a lawyer had not prepared one or told his client he had not prepared one, and prepared one in a day that was utterly inadequate. The court under those circumstances in fact will permit you to file supplemental, and I had second thoughts about those kinds of petitions.

Q. After you prepared the petition for certiorari that we have discussed, what would an attorney do next?

THE COURT: Let me interrupt, Mr. Landers. I want you to make a full record. But I am not sure that the defense will not stipulate to the point that you are trying to make. That is, that it is a time-consuming undertaking, and it requires, I don't want to quantify it, but it requires a certain amount of expertise to do it. It is not the ordinary case, is that the point that you are trying to make?

Mr. Landers: Merely one of the points. I think if Your Honor will bear with me a little longer, his testimony will reach some of the concerns that Your Honor expressed in this court's recent order on the summary judgment motion. I think Mr. Boger will testify, Your Honor, to what is required at the state level, what is required at the federal level, and the interplay between the two. So if Your Honor would

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bear with me for a little while longer I would like to proceed on this.

THE COURT: We have a question pending, but the witness forgot it and I forgot it.

Q. I will be happy to ask it again.

Q. After you prepare the petition for certiorari, what does a knowledgeable and diligent lawyer do next?

A. Well, if the lawyer is planning to proceed on the representation even before the grant or denial of certiorari, the time is, has to begin the preparation of the state post conviction document. In my judgment the state post conviction petition is often the most critical single document in the capital litigation.

Because of the doctrines with which I am sure the court is familiar that restrict counsel in federal courts to issues that have been raised and exhausted in the state courts, if the state petition is not carefully and thoroughly prepared, it will constrain the defendant from all further assertions of constitutional rights.

So the investigation and preparation of that document is critical and work has to get started long before certiorari is acted upon, granted or denied.

Q. What does counsel do to investigate and prepare that petition?

A. Well, what I have taught people, and what I myself

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conceive the task to be is five fold. Five fold exercise.

The first responsibility is to meet and have several extended discussions with client. And I can go into more detail on that, but let me simply lay them out.

The second is to do factual investigation.

The third is to do legal research.

The fourth is to draft the petition itself.

And the fifth is to prepare whatever collateral papers are demanded by the particular needs of the litigation. So those are the five basic tasks.

Q. Perhaps you could describe in a little more detail what tasks you would do in interviewing a witness and the factual investigation for the petition?

A. All right. The client is the most critical single witness to the events about which you are concerned. He has participated presumably in the crime, certainly participated in the police investigation of the crime and the courtroom scene as well. He knows intimately what the lawyer has done for him and with him. He knows intimately what the lawyer has done for him and with him. He knows a lot about what the courtroom activity has been.

But capital clients when they reach death row are often extremely alienated from the legal system generally and from lawyers. They have lost their case, they have lost their appeal, their lawyer has announced he or she has left the case leaving them to the mercy of the state.

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And my experience is that it takes a considerable period of time to break through the depression and the mistrust that initially greets one when one interviews a capital client after direct appeal.

Once that barrier has broken down, the client, as I have indicated, has an enormous amount of information that a capital defense lawyer will need.

Now, what makes it difficult to get that information is that very often the client does not know what he has. Doesn't know its value. Doesn't understand that that chambers conference that he didn't get to go to that doesn't appear on the record, or that station house confrontation with a particular officer has any bearing on his case or his constitutional rights. That is especially true, obviously, if the trial counsel hasn't brought that out.

So one has to go through a very pains taking process of talking the client through the entire case from the time of the crime itself through the end of the trial.

One also with the client has to talk about his family, his environment growing up, and touch upon those matters which may bear on the quality of mitigating evidence that was or could

have been presented at his capital sentencing proceeding where his sentence was itself provided.

That in my judgment usually takes a number of visits. The kind of visits where you come at 10:30 in the morning and

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leave at 3:00 or 4:00 in the afternoon. I mean two or three at a minimum normally are required.

What you are doing there bears on the second point that I made. The factual investigation.

We teach and we ourselves follow the practice of re-investigating the crime from the beginning in a capital case.

We go back and talk to the police officers who did the investigation, to the witnesses who testified at trial, and any witnesses on the indictment who didn't testify.

We go to the scene of the crime. We certainly talk with the prosecutor and with the trial counsel. All of that to gather information to determine the extent to which the case was adequately litigated initially.

The extent to which factors that may have been important weren't brought out either because of police or prosecutorial reluctance to bring them out or lack of defense zeal in finding them.

Finally we go routinely to the family of the defendant to determine whether there are matters that he is unaware of that ought to have been presented to the jury been presented at least to some expert, a psychiatrist or psychological expert in the case.

This process in my experience takes several intensive days of investigation in the most simple of cases and one

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where there are no leads to follow up.

A day or two talking with the states witnesses and the police, and a day or two talking with the defense counsel and with the defense witnesses.

Q. I wonder if you could describe in somewhat more summary fashion the legal research, drafting and collateral

motions that you are interested in.

A. Fine. The legal research that precedes post conviction petitions drafting inevitably obviously must focus on the issues that your factual research has uncovered. But you need to research not only the state of the law on the criminal law issues, but also to determine in your own jurisdiction, in the state or in the federal court. You need to find out what the Supreme Court of the United States has done or is doing on these issues. Because you are often constrained from coming back later if the law changes in raising a claim anew.

So you have to go to the supreme court reporters and find out what the court is up to. You go to the court of appeals in your circuit and find out what they are up to. You look in other circuits because often you may have a subtle principle of law in the fourth against you but a favorable precedent in the 6th or 7th, and that becomes an important item to put into the petition for ultimate review on certiorari.

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That legal process can take anywhere from two to five days. As the court mentioned, if the lawyer is much more experienced in the criminal law, it takes less. But even lawyers that are experienced can't afford to make a mistake. You can't afford to miss a constitutional issue or characterize it only as a fifth amendment confession problem if it has a fifth amendment and a sixth amendment variation. And therefore it is critically important all of that legal research be done.

Q. How long does drafting take of the petition itself?

A. Well, obviously, that varies depending on how many issues you have.

Drafting in my judgment is a day or two process, again, at minimum, because what one has to do is not simply articulate the legal theory of the constitutional claim, but one has to provide enough factual support to persuade the judge that it is a serious issue and not a boiler plate assertion. And what we found is that very often the factual pleadings that accompany the state post conviction petition find their way into the hands directly if no stay of execution is granted, one is litigating under a warrant,

finds their way into the hands directly of the Federal District Court or Court of Appeals, or even the Supreme Court. It is no time, in other words, for summary pleading.

The collateral papers that I mentioned, this 5th

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object of ones effort also vary depending on this point. If there are facts that need further development and one has to obtain a psychiatrist or psychological expert one needs a ballistic expert or a serologist, you have to put that in a motion that accompanies the petition itself, or run the risk that you will never get any further. That you will be thrown out of court before you have a chance to inform the judge that you have got an important issue that needs that kind of investigation.

So that the collateral issues and papers that accompany them also have to be carefully thought out and put into this initial petition.

Q. Having filed your state papers, what do you do next?

A. Well, that depends on what the state does next. If the state moves to dismiss, you have a critical moment in litigation because obviously if they dismiss none of the factual development you may want in an evidentiary hearing or by way of discovery can take place so you have to litigate that motion with all of the legal and factual resources that are available to you.

Assuming that there is no such motion or that it is denied, then you proceed to toward a hearing.

Now, if you have asked for further evidence, in most instances in state post conviction there are issues that require further factual development.

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Q. All right. What is the next step in the litigation for an attorney?

A. Well, beyond post trial briefing if there has been an evidentiary hearing one then litigates up to the State Supreme Court either by way of direct review, if that is permitted, or certiorari. But one thing I need to jump in and say, all of this

is contingent and shaped by the calendar of events leading toward execution. If a execution date has been set say 60 days in advance and one is filing ones state post conviction document, one has not only to worry about the Court before it and the papers that is preparing, but one has got to also mentally be preparing litigation plan that will permit you sufficient opportunity to address each of the intermediate courts that are available to you before execution.

As the date draws nearer, your attention is diverted into multiple courses. You are worried not only about what you are saying in state papers, but how that will affect the federal papers you might have to file the following week or how that is going to affect the Fourth Circuit argument you are going to be making and the Supreme Court argument you are going to be making and the Supreme Court cert. petition that you are going to be filing. So to that extent it is a disservice to the reality of the situation to suggest that one proceeds simply sequentially step by step. One has to have all of the steps in mind simultaneous if there is any

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time pressure.

Q. Assuming that you are not successful in the State Supreme Court, what do you do next?

A. Well, again, if there is time, I recommend the filing of petition for certiorari again. You have raised issues in the state post conviction forum which you think are substantial and you would like the Supreme Court to look at them, particularly if you have an evidentiary hearing and a good factual record for presentation to the Court.

On the other, hand if you are 15 days away from an execution normally we recommend that people by-pass that step and get into the Federal District Court in order to file their petition and obtain a stay of execution, if possible.

Q. What do you do to put together a petition in the Federal District Court do you merely change the caption on the State Court Petition?

THE COURT: Not if you hope to succeed.

You certainly are bound by the issues that you have raised in state post conviction and on direct appeal.

You want to merge those two. In other words, all of the issues that have been presented on direct appeal have been exhausted. They typically have not been put in the post conviction document, so the federal document has to include those as well as the ones exhausted in the post conviction process. But you also may have encountered waiver or

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forfeiture doctrines or the state court may have thrown some of the claims out as untimely asserted and your federal petition then should address those issues directly.

The cause and prejudice requirement, so called, *Wainwright v. Sikes* case. You may have some problems with a mixed petition with some issues that aren't exhausted on law and facts. Those have to be included. And you obviously have to take account of whatever fact findings the state post conviction court has made under the state habeas practice and rules. Those fact findings are presumed to be correct if proper procedures have been followed in the state courts. If you are unhappy with those fact findings, and maybe with the procedures, you have to lay out in the federal petition what has been the inadequacy of that state fact finding process.

Q. So the federal petition then presumes counsel of what happened below?

A. Oh, necessarily. Necessarily. It really takes what has been done in the state post conviction and what has been done on direct appeal, incorporates that and puts it within a federal context that requires addressing three or four or five different peculiarly federal concerns.

Q. After you file your federal petition, what is the next task that an attorney must undertake?

A. Once again you wait to see what happens either from the Judge under rule 4 of the rules governing section 2254

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cases because the Judge can dismiss a petition that is frivolous, or

if the state responds you have to see if they are responding with an answer or motion to dismiss with motion for summary judgment. It may be what is crucial is the stay question, an execution is facing you and the real issue is we need a hearing on a motion for stay or execution. At which the merits will be addressed in passing, but in which the real issue is whether that there is sufficient substance to those claims that the Court ought to inquire further. Simply a wide variety of possible tasks for the lawyer depending on the status of the litigation.

Q. Could you take us through in rather summary fashion the remaining steps that a lawyer would undertake in a post conviction case?

A. Fine.

If one were unsatisfied with the quality of the state court fact finding one would obviously ask for a federal evidentiary hearing on any issues where evidence is important.

The federal courts have plenary power to rehear the evidence, and obviously often will be obligated to under state and case law.

Once that hearing were completed, one would have a post hearing briefing and then the Judge would issue a ruling, presumably. If the ruling were unfavorable, one

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would have to seek a certificate of probable cause to appeal.

As the Court is aware, there is no direct right to appeal in habeas cause. One must first apply to the Circuit Court and then the District Court for leave to appeal.

One must marshal one's arguments under some standards that the Supreme Court articulated, whether a — whether a case is sufficiently meritorious or worthy to permit that kind of certificate to issue.

One would then go to the Circuit Court if the leave were granted, file a brief and have an oral argument and then prepare a petition for certiorari if that were unsuccessful.

Q. And that would be your final step the petition for certiorari?

A. Well, it would be near the final step.

What we find is that often the law has developed so

radically even in the course of 9 or 12 months that new issues may be presented at that time. The Supreme Court as everyone I am sure is aware has granted stays of execution even as recently as this week in cases where on the initial federal habeas pleading everything was put in that one was aware of and yet the law changed sufficiently that a second or successive petition were appropriate. So there might even be a second round of litigation that would parallel, although in abbreviated facts, state post conviction and federal post

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conviction as well.

Q. You mentioned in your testimony, Mr. Boger, that there isn't always a neat progression from state to federal court. The path of the litigation may go from one court to the other court. Elaborate on that a little bit for us.

A. While there can be some sort of conceptual clarity as I described the process as at least I hope conceptual clarity in practice, one often finds particularly in a capital case under the heat of litigation that one may be in one or two or even three courts at once. One will have some matters that are exhausted, the state court is ill disposed to grant a stay of execution, one must go to the federal courts, file a federal petition on exhausted issues and inform the federal court I have some unexhausted claims I would like to pursue in the state courts. I haven't gotten a stay from that court, will you please grant a stay and hold your federal matters pending the exhaustion of these state law claims?

One sometimes even, I have had occasion when in this circuit to be in the Fourth Circuit arguing the Circuit Court should remand the matter to the District Court to stay the proceeding or stay the execution and permit state exhaustion to go forward on issues that were not presented previously to those courts.

Q. What, if any, in your view is the likely effect of changing counsel after post conviction proceedings have

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begun, for example, having one lawyer prepare the state habeas

papers and then having them pass the baton to another lawyer to conduct the rest of the litigation?

A. As a practical matter it is a disaster. It is almost unthinkable, because as I described the process of investigating both legal and factual, one must do a lot of research, and unless one writes memos to the files on every item, every witness one talks with, every item of information one obtains, that becomes part of the common fund of knowledge and memory that may form a later judgment about what is a good legal issue or what the factual point to pursue is.

That all gets lost if new counsel comes in that hasn't done that work. And consequently we strongly discourage lawyers from dropping cases at those stages. The same argument can be made about, or the same point, about legal argument and legal issues. If you have done three day's of work in the library, that normally doesn't result in a 50 or 65 page memorandum of law if you are a sole practitioner, but it results in a lot of information about legal development that may inform subsequent judgments. All of that is lost if you switch counsel.

Q. How long in your experience does this entire process take that you have just described for us? How many lawyer hours are spent from beginning to the end in the process?

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A. Once again, that obviously varies widely depending on the nature and difficulty of the case.

And I have seen great variation.

But, I don't think I have seen a case done remotely well where a lawyer spent less than 3 to 5 hundred hours in litigation. And those are the cases that were successful. Didn't involve great evidentiary struggles or unusually difficult legal problems.

Now, the one exception though that is, I know plenty of lawyers that have been involved with an execution date facing them and in a 30 or 45 day period before execution who have been unable to get stays in court after court. What that typically involves is 30 days of virtual around the clock work. A lawyer will take a case Monday May First and at end of May they will have done no other work except litigate in five or six courts.

That may add up to less than 3 to a 5 hundred hours, but nevertheless a substantial amount of time.

Q. In your opinion, based upon your experience, and your experience representing death row inmates and with them, is the average death row inmate capable of adequately representing himself in post conviction proceedings?

A. Absolutely not.

Q. Is any death row inmate you have ever known capable of representing himself in post conviction proceedings?

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A. No, not competently at all.

Q. Why not?

THE COURT: I really want you to develop your record, but I wasn't born with this robe. I practiced law for 22 years and handled a lot of criminal cases, and there is not a person on the Court of Appeals who was born with a robe. There are some things that we just know. Here you represent some man — he who represents himself, for example, represents a fool.

Q. I would not belabor the point, Your Honor, but one thing has led me to try to get some evidence on the record. The Commonwealth evidently isn't of our view, Judge. They have as I understand it in response to requests for admissions denied the proposition that a death row inmate can't adequately represent himself, and given that fact, sir, I feel constrained to get an opinion from someone who knows.

THE COURT: I would be interested to hear their views in that regard.

Q. We all will be in that regard.

A. Let me be brief. Obviously no one who is confined in a four by twelve cell can do factual investigation very well. Certainly not the kind that requires going to the scene of the crime and talking to police officers and so forth.

In matters of legal research, capital cases are particularly difficult, and although some clients are bright

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and could understand one stage of a proceeding sometimes, and

one facet of the criminal law, very few can integrate the procedural and substantive and the constitutional questions that are needed in order to make accurate assessments of what issues have merit and what don't.

Or, as the Court I am sure is aware, capital inmates are limited in intelligence or have psychological or psychiatric problems, and even those that are intelligent are often among the less educated portion of society and even of the prison population.

Finally, and I think that is perhaps unique to capital inmates in my experience, the prospect of facing death or having to come to terms with an execution date or a date certain for one's demise is seriously enough involving and challenging emotional and personal crisis that even an inmate who was a law graduate and who otherwise had the capability to do legal and factual research, probably does not have the detachment and dispassion to litigate under those circumstances. I have had lots of clients in those last 60 day time periods, and what they are forced to do is to prepare themselves mentally and spiritually and emotionally to deal with their family and their children, all of whom see them as about to die. And that is a full time job.

And very few of them, I think, even have the emotional resources to talk with you meaningfully at that point about

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their case. Much less to take it over.

THE COURT: Haven't you found as well that there is a certain psychological barrier for some lawyers to handle capital cases?

A. Exactly, Your Honor.

THE COURT: I mean I practiced, there were good criminal practitioners here in Richmond, I know one in particular who was excellent, he simply could not handle a capital case. The risk of a capital case.

A. It is one of the most surprising phenomenon that I ran into is some of the very best criminal lawyers, as you say —

THE COURT: Criminal practitioners. There are few criminal lawyers.

A. Criminal practitioners. Would simply freeze on the case.

We call them and they would say I will do the work during the week, and you call them and they didn't do a thing. And they had some excuse, and finally would confess I am just petrified, I cannot move in this case. That is a factor. But it certainly is more prevalent among clients than the attorneys.

Q. In your opinion will providing legal representation to a death row inmate have any substantial effect on that inmate's ability to present his legal claims to a court?

A. Definitely.

Q. What effect will it have?

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A. Well, the lawyer should be able to provide some sort of rational presentation to a court that marshals all of the evidence and all of the legal theories and shows the due process violations, if any, in the client's trial. The client cannot do that for himself in virtually every instance.

Q. Mr. Boger, have you attempted to obtain volunteer lawyers for Virginia death row inmates?

A. Yes, I have.

Q. When did you make your first such attempt?

A. To my best recollection it was 1981.

Q. And for what inmate were you attempting to obtain counsel?

A. We learned of an inmate named James Briley who at that point was already in the Fourth Circuit. What we learned when we were contacted in March of that year was that his trial counsel had dropped the case after direct appeal, had not prepared a certiorari petition for his client, and therefore the Supreme Court really was not addressed. No state post conviction proceedings had been undertaken. A pro se habeas corpus petition had been filed by someone on his behalf. Counsel had been appointed some two weeks before the execution, a brief evidentiary hearing had been held before Judge Warriner, relief was denied, and the matter was in the Fourth Circuit.

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At that point we entered the case as amicus curiae for

the Court and filed a brief suggesting that in light of our quick review of the record and the number of constitutional issues that appeared present which had not been addressed, that the Court of Appeals ought exercise its discretion to stay the execution and remand the matter back to the District Court to permit a post conviction proceeding to take place in the state courts. We volunteered to represent that client ourselves or to find volunteer counsel on his behalf. The Court of Appeals granted that motion and remanded the case, and we obtained the services of Arnold and Porter in Washington and Gerry Zerkin in Richmond on that case.

Q. Have you had subsequent occasion to attempt to find volunteer counsel in Virginia?

A. Yes. I mean, I have been contacted on numerous occasions, over a dozen, often by Marie Deans of the Virginia Colition and have looked on behalf of that many people, at least.

Q. Did you attempt to try to find counsel for a Virginia death row inmate named Earl Washington?

A. Yes. I think I first heard of Earl Washington September 5 of 1985, execution date in the middle of last summer, sometime in late June or early July. I called attorneys and had my Director of Research call attorneys in New York and Chicago and the Washington, D. C. area. We were

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unsuccessful in our efforts to locate counsel.

Q. You formed any opinion regarding whether volunteer lawyers will be found in sufficient numbers to provide legal representation to all death row inmates in Virginia who will need volunteer legal representation?

A. Yes. I have an opinion on that.

Q. What is your opinion, sir?

A. I think very soon now we will be unable to find lawyers sufficient for the number of inmates. Let me explain.

What I have perceived in my ten years of experience in Virginia and in other states.

When you begin to find volunteer lawyers for capital

inmates there at first is a willing group of attorneys who will handle those matters on a volunteer basis.

The cadre is larger or smaller in one state or another, but it is there.

But what you find is that as those attorneys take two or three cases, as Lloyd Snook has done in Virginia, at some point if they do their job well, they are filled with pro bono cases and the cases don't go away. They are not like a slip and fall case or even a normal criminal case where you try it and it is over. They are there for these six or seven or eight steps that may take four or five years.

And so their resources become unavailable to you.

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And at that point you squeeze a little harder and you find some other attorneys, but at some point the willing number simply diminishes to virtually zero.

We have been handling that problem in Virginia and Georgia and other states for some years now through the provision of outside counsel. Lawyers largely from big firms, but sometimes from solo practices in the major metropolitan areas. But we are reaching the point where they also have two or three or four cases. I mean, the firms in New York that will take capital cases have got two or three, and we call them and they say, you know, we have done as much as we can do for you.

So those resources come to an end. We have gone to the American Bar Association, a committee was fully formed out of the bar association to recruit lawyers from that membership. It is recruited, the ones that we have been able to find.

In other words, you begin to deplete all of those resources. That is where we are now.

Q. I have no further questions, Your Honor.

THE COURT: Is there any cross-examination?

Cross-Examination

By Mr. Gorman:

Q. Mr. Boger, I think in the very beginning of your testimony, and correct me if I am wrong, you indicated that

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one of the functions of your organization was to provide assistance and information to the public, and I believe also one of the functions was to train attorneys, is that correct?

A. Those are two functions, yes.

Q. Of the ones you have listed?

A. Right.

Q. And in the process of training attorneys, could you elaborate on that a little bit? What do you do?

A. We do a number of things. As I indicated, I guess, a little elliptically, we go to seminars, we have been to seminars that are sponsored by the National Legal Aid and Defender Association or the National College of Criminal Defense. This year I have been to state Public Defender Conferences in Illinois, Ohio, and Indiana and Oklahoma. We also hold a seminar ourselves every year in Warrenton, Virginia and have lawyers from all over the country who do capital defense work, come to that seminar to learn technique.

Q. Are these free seminars to attorneys?

A. No. Not always.

Some of them the attorneys pay their expenses. We certainly don't charge anything for the information.

Q. I see.

In connection with the educational role of your organization, Mr. Boger, do you, have you prepared any

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manuals or materials specifically directed toward capital litigation in post conviction matters?

A. I haven't. Our organization prepared a manual back in 1980 or '81, which has gone through several editions, called the Federal Habeas Corpus Manual, which is a four or five hundred page document.

Q. I see. What does that manual do? Is it — what is its purpose?

A. It tries to outline for attorneys the steps in state and federal post conviction process, particularly as they relate to capital cases.

Q. Is this a manual that you make available to attorneys who seek to assist death row inmates in post conviction matters?

A. We have made it available on a limited basis.

Initially we put it — it was expensive to reproduce and we put it in the hands of the state coordinator type people, and in the hands of lawyers who were doing full time capital representation. More recently as it has grown more out of date and more people have gotten it through passing it among their hands we sent it out I think a little more widely to defense counsel.

We have made an effort not to put it in the hands, to be frank, of Attorneys General or District Attorneys.

Q. Are you familiar with any other manuals in the field

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that covers the same subject matter?

A. Not that subject matter. Well, I take that back. There are a couple of 30 or 40 page documents that are put out by organizations like the Southern Christian Defense Committee, the Team Defense Project in Atlanta, the Southern Poverty Law Center, that handle one or more aspects of the subject.

Most of them, though, are directed primarily to trial practice and not to post conviction practitioners.

Q. Are you familiar with a manual prepared under the auspices of the Southern Poverty Law Center and I think authored by Dennis Bausky?

A. If you told me the title, I would be certain. He has written a number of things about post conviction.

Q. You are not specifically familiar with that manual?

A. I am sure I have seen it. I have got a desk top that is filled with about 15 manuals that are put out. Some of them are trial and some post conviction.

Q. All right. That is not really that important.

Going on in your testimony, Mr. Boger, I believe you stated that there were 18 hundred inmates on death row, you mean in the United States, don't you?

A. Correct, in the United States.

Q. Do you know how many are in death row in Virginia currently?

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A. About 30, I think.

Q. About 30.

In view of the testimony that you have given today would it be safe for me to conclude from your testimony that these 18 hundred inmates were not generally represented by court appointed attorneys.

A. The answer is a little complex. Some of them are under sentence of death and are still on direct appeal. Those of course are still represented by court appointed attorneys.

Most of these who are past that stage, though, have volunteer counsel. Some have attorneys that have for one reason or another been appointed by a court.

Q. Do you know how many states currently have the death penalty?

A. It varies year to year, and I think it is about 39 at this point.

THE COURT: The Justice said last night 37 or 38.

A. I will stand corrected, or maybe I won't. Maybe we have better figures sometimes than the Supreme Court does, but that sounds right. I think we include the District of Columbia and some other jurisdictions that aren't stated in our count.

Q. Mr. Boger, of those 37 to 39 states, do any states in that group, and please tell me how many if there is an

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affirmative answer, do any states in that group have programs to appoint automatically attorneys to represent death row inmates following affirmance of their conviction or on direct appeal?

A. Yes. Some do. Although it is not always an appointment system. The State of Florida has an office, the Capital Collateral Representative who was established I believe last year, which is staffed with ten attorneys. The sole obligation is to provide counsel in state and federal post conviction proceedings.

THE COURT: Paid for by the State?

A. Paid for by the State. My recollection is the initial

budget was 8 hundred thousand dollars for the first year. Actually for the first 9 months of its operation.

A number of the northern central states. Particularly Ohio, Illinois, Indiana, New Jersey, Connecticut, have public defender offices which have been authorized to set up special capital post conviction programs that represent inmates in post conviction proceedings and have staffed those with attorneys recruited for that purpose. California has a program that used to be public, and when the administration changed and the former Attorney General became Governor the program kind of went private. And it is called now I think the California Appellate Project, which provides representation in state and will probably provide

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representation in post, federal post conviction proceedings as well. That is paid for by Bar contributions, but the State Supreme Court also funds those attorneys for their direct appellate work out of its funds available to appointed counsel.

Q. All right. Is the fair to say, and if you can't make an estimate, don't, but is the fair to say that approximately one third of the states have some form of court appointed attorneys or assigned counsel and two thirds do not?

A. I would hesitate on the specific figures because I haven't done fly counting, but it seems right to say that more do not have such program than do but a substantial number do and the two third to one third sort of reflects that roughly. So while I am not certain of that figure, I am certain of the thrust of it.

Q. All right. Thank you.

Now, going back a little bit to your qualification, I hope I am not skipping around too much, you stated that you had been involved in 60 to 80 post conviction proceedings in capital cases, is that correct.

A. That is my estimate, yes.

Q. Have you ever tried a capital murder case?

A. Never.

Q. ?

A. I am an appellate and post conviction attorney.

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Q. You stated earlier on in your testimony also Mr. Boger that about half of the death row inmates who had pursued post conviction assistance have obtained some sort of relief, maybe I am phrasing the remarks improperly?

A. I am, you are correct that is my [TEPL].

Q. Did all of those have court appointed attorneys or volunteer attorneys who succeeded?

A. I don't know of any capital inmate who has represented himself pro se for any extended period of time that I can recollect in my 9 years at the legal defense fund that certainly have been known to us. So that to that extent all of them have either court appointed attorneys or volunteer attorneys.

Q. To the extent of your knowledge?

A. To the extent of my knowledge.

Q. Are you familiar with all of the cases that have been filed?

A. Oh, certainly not familiar with each one.

And I am sure our office is not a hundred percent effective no more than any other office. But one of our purposes is to identify every one on death row and ascertain for ourselves whether they have counsel and if they do not, the red, to red flag that defendant and find 0 lawyer or find someone who will find that person a lawyer.

So it is with that sort of purpose and the sense that

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post people who are pro se quickly get executed and my knowledge of who has been executed is that I infer that there have been very if you people representing themselves over the years.

THE COURT: Mr. Boger, do you have any knowledge as to what the, percentage of death row inmates are represented by paid counsel.

A.

THE COURT: Not volunteer not state sponsored, but individual counsel.

A. It is a very small fraction. By paid counsel you mean privately retained.

THE COURT: I mean where somebody in the family

or —

A. Very small fraction. I mean, I would think less than, I know less than a dozen instance out of the 18 hundred people on death row. Even if one was not indigent at the start of the trial process, one is almost invariably indigent by the time the direct appeal is over, the family has put up the house, the assets are gone and there are also very if you private attorneys who thought that this is an area where they won't to to make a living because there are no funds typically available and one can't depend even on a significant fraction of paying clients to handle the pro bono representation.

THE COURT: Well, would it be fair for the Court to

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come to the conclusion, as I already have, based on the record, to be sure it is not just my perception, that it is difficult to get attorneys to represent death row inmates regardless of whether they are appointed or volunteer or they are paid.

A. It is — there is some difficult. Most attorneys approach a capital case with some trepidation. They are uncertain about their ability to handle the emotional drain, the financial burden, they are uncertain about whether they state and federal post conviction providers will be too [TRARPB]. We find our definitely [TKEUPBG] a lot of assurance, part of the manual is to alleviate the anxiety the situation produce and indeed) we urge people to take the cases assuring them we will be there at the other end of the [TPEPB] or Marie Deans will be there even with that a lot of lawyers pull back and are reluctant to take the cases.

THE COURT: Well there is really a limited not not anywhere as limited as when I was practicing but isn't there a limited criminal bar practitioners.

A. That is correct. We have really reached far beyond the normal criminal bar for many of our volunteer attorneys.

What we assert is any skilled civil practitioner with sufficient effort can do the job that is necessary. It takes more effort obviously if you don't really know the criminal law well, but since most criminal practitioners aren't

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familiar with state and federal habeas corpus we assure them they don't start out at a significant disadvantage to other criminal practitioners.

THE COURT: Even if the state provided a payment, what would be your view if suppose they said, yes, we will pay as we do —

A. I think that often makes a significant difference. Let me explain why, Your Honor.

There are a lot of lawyers with enough good will to take these cases, but they have spouses or partners in practice or debts from school, and if they know to a certainty they are going to be five to ten thousand dollars out of pocket in addition to the lost time, they simply can't face those to whom they have responsibilities.

If though you can say, well, we will cover out of pocket expenses and we may give you some money for your time, these are cases that peculiarly enough are have certain appeal because of the stakes, and my judgment is that you can find attorneys or challenge attorneys to take them and be reasonably successful.

I don't know what happened if in Virginia instead of 30 people on death row you all of a sudden had 2 hundred. But I think you could go from 30 to 60 and from 60 to 90 and probably find sufficient counsel if you had funds to defray those costs.

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THE COURT: Go ahead. I am sorry.

Q. On that subject of volunteer attorneys, is it your routine practice to recruit only persons, attorneys, with prior experience in capital litigation post conviction matters?

A. Oh, no. I would say the majority of people we recruit have never done a capital post conviction proceeding.

But we make it clear to them that to do that proceeding they are going to have to go through the kind of self-educating process that I have outlined.

Q. Well, you indicated to Judge Merhige a moment ago if attorneys are paid and their expenses are taken care of it will be

easier to recruit them, is that what you told the Judge?

A. Yes, I think so.

Q. How much money are we talking about, do you have any idea, where it would become attractive to take such a case?

A. No. You see, one area that I am not an expert in is the economics of private practice. Having been a public interest lawyer for about a decade. I mean, I don't know whether at a 20 dollar an hour rate you would have sufficient interest, or take 25 or 40, I don't know whether — certainly some people would do it for simply out of pocket expenses given how serious those are. It is almost a question of calibrating what would be a sufficient minimum that you would

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attract enough people to handle whatever volume of cases you have. I am not one of the law and economic people that can answer that kind of question.

Q. If a court appoints an attorney in Virginia, do you know whether that attorney is compensated?

A. I am sorry the trial —

Q. I am sorry, habeas, state habeas corpus.

A. No, I am not — Virginia is not one of the states where I have done most of my work, and I am not familiar with the mechanics of that appointment process.

• • •

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Q. All right. Is it the initial petition that is the important one, or is the petition that is finally presented to the Court and decided upon by the Court in state habeas corpus?

A. Well, if by that you are talking about the petition as amended, my judgment is that your first step into the Court is critical because you may find that you are not permitted a second step if the first step is not an adequate one. In other words, in most states if you file a petition and the judge deems it insufficient or frivolous, he or she may simply dismiss it or the state may move to dismiss and it is gone. So you have got to be very careful

there. Obviously the Court ultimately decides whatever amended petition it is permitted to be before it. But if it hasn't taken the time or the trouble to permit amendments, if it is all moved more quickly than that, the first shot is your only shot.

Q. All right. You mentioned that in preparing the petition various steps need to be conducted. I think you mentioned five.

Now, as far as investigating the facts, do all attorneys do a complete factual investigation before they file?

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A. Certainly not. As a matter of fact, they do not. A lot of attorneys do poor jobs post conviction because of the constraints of time or finances.

But, we give this advice not to build the cadillac of defenses, but because in the vast majority of cases where that kind of factual research is done serious constitutional errors in our experience have emerged.

Q. In your experience. All right.

As far as petitions for certiorari to the United States Supreme Court are concerned, have inmates ever filed their own petitions for writs of certiorari to your knowledge?

A. Yes. I have known of some inmate petitions. I have never known any that were successful.

But I have known some that were filed.

Q. Does the Supreme Court have a procedure for the appointment of counsel?

A. No, they do not.

Q. None?

A. Not unless the petition is granted. If a petition for certiorari is granted, then appointment does take place for an indigent.

Q. None?

A. Not unless the petition is granted. If a petition for certiorari is granted, then appointment does take place for an indigent.

Q. Is that a mandatory requirement to your knowledge?

A. Yes. I think the court rules provide once certiorari is granted, if there is no counsel the Court will appoint

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one. But, of course, you know there are 5 thousand petitions and they grant cert. in about 150 cases. So, the vast majority of capital inmates who would be filing pro se would be speaking for themselves without the assistance of counsel because cert. wouldn't be granted.

Q. I see. I am sorry, have you finished?

A. Sure.

Q. Okay.

As far as federal habeas corpus is concerned, do the federal rules provide for appointment of counsel in habeas corpus matters?

A. Rule 8 of the rules governing section 2254 cases provides for the appointment of counsel if an evidentiary hearing is to be held.

I believe one of the discovery rules provides for the appointment of counsel if the court grants the state's motion to discover the defense. But other than that, no, there is no provision, and in my experience I know of fewer than two dozen cases in which counsel have actually been appointed for capital defendants in federal habeas proceedings.

Q. This is nationwide?

A. Nationwide. Now, the reason, of course, is that most of these defendants already have volunteers, because they can't afford the risk of going pro se into the federal courts and then hoping for counsel. Counsel is there, are there at

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their side. But even under those circumstances I know very few nunc pro tunc appointments where lawyers come in as volunteers and subsequently are deemed counsel. I know dozens of people who have conducted federal habeas hearings.

Q. So that circumstance of people who come in as Volunteers who do not become appointed counsel in the case is a circumstance that prevails throughout the country?

A. That is my impression.

Q. Are you familiar with the appointment procedures for

attorneys under 28 U.S.C. Section 1950?

A. No, I don't believe I am. Section 1950.

Q. 1915. Specifically 1915 D. .

A. No, I don't believe so.

Q. Informa Pauperis Statute for Federal Courts?

A. The statute that we have always turned is to 18 U.S.C. 3006 A., Criminal Justice Act.

And if there is something under 1915 D., I don't normally turn there. Maybe I should.

Q. I believe in your testimony you addressed the question of changes in lawyers during a post conviction proceeding. And you I believe opined that this was, would lead to bad consequences, is that right?

A. It can, yes.

Q. It can. That is true of any case, is it not, any legal matter?

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A. Yes. It can be true in any legal matter. It is peculiarly a difficulty in cases where lawyers have to either work under pressure and haven't kept adequate files or records, or cases where decisions have to be made quickly. I know, you know in civil cases that have been involved in, when new counsel comes in you can normally say to a court give me six months or nine months somebody new has come in the case, we have got to take it over. Obviously in a capital case, we have got to take it over. Obviously in a capital case, and I have seen this happen a lot if you are proceeding toward an execution and somebody makes a change, the Courts very rarely allow you that kind of period for start up.

Q. All right. In conducting post-conviction proceedings, would you suggest to an attorney that he consult, if one is available, another attorney to get a second opinion to see if he might have left out any issues?

A. Oh, yes, yes, we urge lawyers to do that.

Q. Now, getting to the question of inmates representing themselves, you spoke of the limitations in conducting legal research. Is that correct?

case, we have got to take it over. Obviously in a capital case, we have got to take it over. Obviously in a capital case, and I have seen this happen a lot if you are proceeding toward an execution and somebody makes a change, the Courts very rarely allow you that kind of period for start up.

Q. All right. In conducting post conviction proceedings, would you suggest to an attorney that he consult, if one is available, another attorney to get a second opinion to see if he might have left out any issues?

A. Oh, yes, yes, we urge lawyers to do that.

Q. Now, getting to the question of inmates representing themselves, you spoke of the limitations in conducting legal research. Is that correct?

A. That is right.

Q. All right. Would you disagree with the statement, then, that pro se petitioners are capable of using law books to file cases raising claims that are serious and legitimate if even ultimately unsuccessful as far as death row inmates

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are concerned?

A. I would qualify that statement rather substantially. I mean that may be theoretically the case. It is certainly not the case for many clients who are mentally defective or who have had psychological or psychiatric problems. It is not the case that because one can file one fourth amendment claim or one fifth amendment confession claim after a great deal of work if one is a bright, unusually bright criminal defendant that one can integrate that same into a series of 8 or 10 or 13 constitutional claims that may need to be presented.

In other words, I guess what I am saying is theory there are some death row inmates who can articulate one or two constitutional claims if given proper access to legal resources. I have never met one who could adequately prepare an entire petition that lays out a series of claims.

Q. Do you attribute that to what you testified to as their intellectual level and their lack of education?

A. In part to that. But in part, to the emotional difficulties,

the severe pressures that are on capital inmates that to that extent are qualitatively different than somebody doing a three or four year sentence. They are constantly facing death, they are in these very strained relationships often with family who is trying to decide whether to continue relating to someone who may be gone in a

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matter of years or not.

That plays a part. I have known at least one law school student who is on death row in Florida who has certainly the most well developed educational background of anyone that I know on death row, and yet he couldn't begin, I think to be capable of litigating his own case.

Q. I wasn't speaking of that so much as conducting legal research.

A. Well, forgive me. Of doing the job that would be required to prepare his papers. You can do the legal research necessary to prepare his papers, I mean that inmate I know, you know, in Florida stays in touch with his lawyers and learns about what is going on and has more appreciation of it than 99 percent of all inmates probably would, but he couldn't keep up with the developments in the law and all the nuances of the relationship between substantive and procedural change I don't think.

Q. The fact that a death row inmate cannot conduct factual investigation because he is confined in a prison, this would be true of any prisoner, would it not?

A. Certainly.

Q. And the fact that a death row inmate may be low in intelligence or lacking in education is also true of most prisoners, is it not?

A. I have not really seen comparative studies on the

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level of intelligence or education of death row inmate as compared to the general prison population. My guess is that they would as a group be somewhat lower. And that some of what is

reflected in the violent nature of their crimes is a function of serious psychological problems combined with low intelligence.

But I don't have any, you know, fund of empirical background on that.

Q. Are you familiar with the intellectual levels or educational levels of the inmates on death row in Virginia?

A. No. I would say I have talked with one and have corresponded with more than that. But I don't have a very good grasp overall of their levels of intelligence or education.

* * *

TESTIMONY OF ROBERT T. HALL

July 10, 1986

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(Witness Sworn.)

Robert Hall testified as follows:

Direct Examination

By Mr. Sasser:

THE COURT: Now you are going to get it. Now you are going to know how it feels.

A. I don't like it.

Q. Please tell us your full name.

A. Robert T. Hall.

Q. Where do you live, Mr. Hall?

A. 2148 South Bay Lane in Reston, Virginia.

Q. What do you do for living?

A. Attorney in private practice.

Q. Member of the Virginia State Bar?

A. Correct.

Q. When were you admitted?

A. October of 1964.

Q. Are you a member of any federal bars?

A. Admitted to practice in the United States District Court for the District of Columbia and United States Court of Appeals for the District of Columbia, the Fourth Circuit Court of Appeals, the Eastern and Western District Courts, Federal District Courts in Virginia.

Q. Are you admitted to practice before the United States Supreme Court?

A. Yes, sir.

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Q. When were you admitted?

A. 1967, I believe.

Q. Could you outline briefly your education?

A. I attended Cornell University in the School of Electrical Engineering from '54 to '57, transferred to Georgetown University, received a Degree Bachelor of Science in 1960 and a Law Degree from Georgetown in 1964.

Q. What did you do after graduation from Law School?

A. I was counsel to the minority members of the Senate District of Columbia Committee, the minority members were Republican members of the Senate D. C. Committee, from '64 to May of 1966.

Q. After that, sir?

A. Private practice.

Q. Are you currently engaged in the practice of law?

A. Yes, I am.

Q. What is the firm?

A. Hall, Sevell, Jackson and Colgan, P.C.

Q. How long have you been with that firm?

A. As a professional corporation from 1977, as partnership with the same professionals, 1975.

Q. What is the nature of your practice?

A. At the present time my practice is predominantly civil litigation. I have just a few criminal matters.

Q. Has the nature of your practice changed since you

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entered private practice?

A. Yes.

Q. How so?

A. In the early days of practice I took quite a few court appointments, both misdemeanors and felony cases, and the ratio was probably 50/50 at one time.

Q. How long ago was that?

A. Probably up until 1976 and '77. And the number of criminal cases gradually declined and civil cases increased proportionately.

Q. Are you still doing criminal cases?

A. Very few. We just completed a murder case in Fairfax at the trial level, and I have handled some death penalty cases habeas on direct appeal.

Q. Are you a member of any professional organization?

A. American Bar Association, Virginia Bar, Virginia Bar Association, D.C. Bar, D.C. Bar Association, Virginia Trial Lawyers Association.

Q. Do you hold any offices in any professional organizations?

A. Currently President of the Virginia Trial Lawyers Association.

Q. Have you in the past held offices?

A. I was president elect in the preceding year, been a District Governor or Vice President of the Virginia Trial

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Lawyers for probably ten to twelve years.

Q. Have you written any treatises or articles?

A. Oh, in the sense that I have written on criminal matters for the Res IPSA Loquitur, a Georgetown University Law School publication, and I have authored chapters of continuing legal education manuals for both the Virginia State Bar when it was handling its own C. L. A. as well as --

THE COURT: Are you endeavoring to qualify Mr. Hall as an expert? If so, what field?

Q. Your Honor, we think he is an expert in the appellate processes and the post conviction processes in the State of Virginia.

THE COURT: Anybody want to cross-examine him on his expertise?

Mr. Harris: No.

THE COURT: He is. Let's go.

Q. Mr. Hall, have you had experience with post conviction proceeding?

A. Yes, sir.

Q. Capital case in Virginia?

A. In capital cases and non capital cases.

Q. Please tell us the names of the Virginia death row inmates that you have represented.

A. First was James T. Clark, second was Richard Lee Whitley, our office represented Manual Quintanna, although I

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was not directly involved in working on his case.

And presently Earl Washington. We have, and I have consulted with other counsel in other cases in assisting. Those are

the ones that we have been engaged in either as counsel or as consultant.

Q. Using for example the case of James Clark, can you tell us just what you as a lawyer do for a death row inmate in post conviction proceedings?

THE COURT: Do or did?

Q. Both, Your Honor. I was using him as example.

A. In James T. Clark we were appointed by the Court to take the direct appeal. And when we accepted that appointment, and looked at what was available of the record on appeal, we filed some post verdict motions, motion to set aside and motion to reconsider based on some matters we observed that were not, we thought, adequately set forth in the record.

We then prepared and took direct appeal. The conviction was affirmed. A petition for certiorari to the --

Q. Let me stop you. What issues did you raise on direct appeal?

A. They were numerous.

Assault on the constitutionality of the then relatively newly enacted Virginia Death-Penalty Statute. Witherspoon issues, admissibility of the Clark confession

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the discretionary as we saw it abuse of prosecutorial power in deciding which of the four defendants in a murder for hire case would live and which would die. Collateralization by issue and other issues of Virginia Common Law, whether or not the confession had adequately been corroborated with where the corpus delicti had been moved.

Q. Any issues relative to his case which you did not raise on direct appeal?

A. Ineffective assistance of counsel did not go up on direct appeal.

Q. Why not, sir?

A. Well, at that time before the enactment of, I forget the Section, 182, I can't remember the number, it was not raisable on direct appeal, nor were there matters of record that were complete on the issue of ineffective assistance. There were issues in

the record that suggested further inquiry.

Q. Are you aware of Statute Virginia Code Section 19-2.317 point one, is that the statute that you were referring?

A. If that is the one which allows you to take ineffective up on direct appeal, that is the one that I had reference to.

Q. Prior to this statute, what had been the practice in Virginia?

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A. Practice had been ineffective assistance could not be raised on direct appeal, had nobody raised collateral.

Q. What is the effect of this statute?

A. Well, I wish I knew. The statute says that ineffective assistance can be raised on direct appeal to the degree that it appears in the record. And in my experience, it rarely appears in the record.

THE COURT: In short what counsel failed to do never appears in the record, does it?

A. I think that is correct, Your Honor.

By Mr. Sasser:

Q. Do you know whether the Virginia Supreme Court ever considered on direct appeal the ineffective assistance of counsel in a capital case pursuant to the new statute?

A. Pursuant to the new statute they have considered it, but I couldn't give you a citation.

Q. Under the new statute do you know whether they have in fact reviewed the issue itself?

A. I don't know.

Q. Okay.

Do you know of any practical limitation to raising the issue of ineffective assistance of counsel on direct appeal?

A. Number one, ordinarily the trial counsel is appointed to take the appeal. That puts trial counsel in the position of assessing his or her own effectiveness. It is not a good

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pragmatic way of challenging ineffectiveness of counsel.

Secondly, the time within which that must be raised is by definition the time within which the appeal must be brought, and even if new counsel is appointed to take the appeal it doesn't give adequate opportunity to investigate those issues which were known to trial counsel and not brought out at trial to determine if those which were not were employed as tactical matters versus those not used because of some say deficit in knowledge and the matters that could be known after an adequate investigation. It is a poor forum for assessing effectiveness.

Q. What was the result of the direct appeal in Mr. Clark's case?

A. His conviction was affirmed.

Q. What did you do next with his case?

A. We filed petition for writ of certiorari.

Q. What was the outcome of that?

A. It was denied.

Q. Where did you go next?

A. We filed, prepared and drafted petition for writ of habeas corpus in the Circuit Court for Fairfax County.

Q. How did you prepare to do so?

A. Well, during the pendency of the appeal and during the pendency of the petition for cert. we continued our investigation into the issues surrounding Clark's conviction.

* * *

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Q. What is the consequence of failure to do that?

A. Waiver.

Q. What do you mean, sir?

A. Absent raising appropriate issues in the trial court, the Virginia Supreme Court won't recognize them, and as we know, now, rather conclusively, Federal Courts on habeas and the Federal Appellate Courts will not recognize it.

Q. Is there a particular rule that you are referring to?

A. Well, it is Rule 5—I think it is 25 of the Virginia Supreme Court Rules that used to be 21, you have to raise it and to preserve it for its recognition later.

Q. Are you aware of cases where Virginia Supreme Court barred a death row inmate from raising unpreserved issues on appeal?

A. Yes.

Q. What is that?

A. The Michael Smith case, the Commonwealth --

Q. Are you aware of any extension to that Rule 5-25?

A. Well, the exception is to attain the ends of justice the Supreme Court can look around and look behind a waiver issue.

Q. Do you know whether the Virginia Supreme Court has ever invoked this ends of justice exception in a Virginia

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capital case?

A. I am not aware of it in a capital case.

Q. Have you read the recent United States Supreme Court case of Smith v. Merridan and Murray v. Curry?

A. Yes.

Q. Do those cases involve the Virginia rules for procedural to --

A. Surely do.

Q. Can you tell me whether those cases will affect litigation and post conviction proceedings in Virginia?

A. Well, they clearly will.

Q. How so?

A. The combination of the two cases suggest, although they don't say so directly, suggest that inadvertence of counsel, that is negligence of trial counsel standing by itself will not constitute grounds for reversal of a conviction where that failure, that inadvertence includes the failure to preserve an issue on appeal.

Q. So what does this mean for someone pursuing most conviction remedies?

A. Well, it is not just Smith, and it is not just Murray and Currior, but it probably starts with Strickland. Issues are the ineffective assistance of counsel are very thorny, very difficult to plot a course through the decisions of the U.S. Supreme Court

how to demonstrate ineffective assistance

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of counsel and the requisite prejudice that came from that.

A. You mentioned a moment ago you review the transcript and look for instances of ineffective assistance of counsel?

A. Yes.

Q. Could you explain what else you do in looking for --

A. Well, in the Clark case as example one thing that jumped out at us was a competency examination by a psychiatrist appointed by the Court to conduct a competency examination, Dr. Ludwig Fink. Fink was of the opinion Clark was competent but said that he thought Clark needed to be worked up, needed to be institutionalized and receive a thorough work up. There was no other indication in the record that any such work up had obtained. We inquired of trial counsel had there been any work up, and the answer was, no. So the flag went up. Why not? Is there any issue of ineffectiveness in that failure?

Q. Where did you inquire of trial counsel?

A. Picked up the telephone and called him and said, I see in the transcript Dr. Fink said this, what happened after that?

Q. Did you conduct any discovery at this point?

A. Well, after filing the petition, we did informal discovery initially, and then such process as the Court allowed us the informal discovery was consultation with trial counsel, and there were two.

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Obtaining trial counsel's files which in one case was very easy, he just handed it to us, and in the other case he was reluctant to let us have it. And it required that we get the approval of I think the Commonwealth's Attorney even though it should have been the Attorney General's Office, but we ultimately got that. We reviewed the contents of those files which consisted in addition to the pleadings the notes of counsel of the interviews that they had had with the defendant.

Q. Did you take any depositions?

A. Well, this is before we got to formal discovery. We subsequently learned there had been a tape recording of an interview with Clark by one of the trial counsel in the Adult Detention Center, which we obtained and audited. Based on what we could glean from the record and the tape of what they did and didn't do we then sought two things by depositions, which the Court allowed us.

Q. Did you have to ask the Court?

A. Had to get leave of court because it was under state rules. In habeas cases it is not automatic that you get discovery.

Q. Continue.

A. To have trial counsel to fill what we thought were holes in the record, including not just Dr. Ludwig Fink issue but some other matters. Then notes of conversations. And

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the cassette reflected in our lay judgment evidence of mental abnormalities on Clark's part.

He rather insistently said he wanted to die. He wanted a plea bargain. He would agree to testify against a co-defendant if the Commonwealth would assure that he got the death penalty.

He had taken that position with Dr. Fink, and Fink reported that he found it very unusual. In the audio tape in particular, these references to, not out there of apparent remorse, but some other purpose he wanted to serve he wanted his death to be symbolic.

We contacted a psychiatrist and a psychologist. We didn't have any funds to do this, but we negotiated with them in effect saying we don't know whether there are any fees payable or not, if you will agree to reduced compensation which we will guarantee, will you look at this for us?

Q. You personally guaranteed it?

A. Yes, sir.

Q. What did these people find out?

A. Saunders and Holliday came to the Adult Detention Center. We filed a motion to have Clark brought from Mecklenburg to Fairfax, which was reluctantly agreed to, for security reasons it was argued. But they spent about eight hours with him

at best, in two four-hour talks by Fink and then Saunders, and then after they gave us a preliminary

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report they came back in about 60 days and saw him again.

They found two things. They found arrested moral development at a very early age. And they said because of his difficulty in dealing with things that they suspected that this was an abused and neglected child. And that if we could find a way to conduct a social history of his family, of his community background, that we would probably find a case of substantial neglect and abuse as a child.

We then engaged services of a psychiatric social worker or a social worker to go out into the field and conduct such an investigation

Q. How cooperative was Mr. Clark during this time?

A. Clark was sometimes cooperative and sometimes not. It was difficult to tell which of the Clark's you were dealing with from day-to-day.

He was not -- he provided virtually no leads, who we should talk to in the community or who Susan Geller, the Social Worker, should talk with. We had to get those from other sources. Those other sources weren't readily available.

Q. Did he initiate this process of checking out his competency?

A. No, sir. After the completion of the social history in which the psychiatrist and psychologist suggestions, forecasts, if you will had been confirmed we confirmed in our

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judgment in a major way, they then came back to see him armed with the social history and completed their diagnosis.

And gave us reports.

A. At that point we started getting the preliminary matters taken care of about the various procedural jockeying in the habeas corpus. We arranged to schedule the matter for a plenary hearing.

Q. Before we get to that hearing. In preparing this petition itself, what other documents did you prepare?

A. We prepared as detailed a document as we could prepare based upon the knowledge that we had of the Clark case at the time. And the informal discovery that we had conducted prior to its filing.

Q. Is it important that this be a thorough document?

A. Certainly is.

Q. Why, sir?

A. Amendment is not a matter of right. And it stands in the sound discretion of the trial court. And my experience from jurisdiction to jurisdiction is some will grant it and some will not.

Q. Does the Commonwealth's Attorney or Attorney Generals Office take a position regarding amendments?

A. Some they oppose and some they acquiesce in or agree to.

Q. What are the other consequences of leaving out an

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allegation in the state position?

A. If it is matter known and it is not in the initial petition, leave to amend isn't granted. Then it is barred for any subsequent petition.

Q. What about before the Virginia Supreme Court on Appeal after the evidentiary hearing?

A. Won't be recognized.

Not in there, raised and preserved.

Q. What about the federal consequences?

A. Again, ordinarily, I couldn't give you percentage of certaintude, but high likelihood not recognized. The issue is gone.

Q. After you filed this petition and before you got to the plenary hearing, what did the Commonwealth do, if anything?

A. Through the Attorney General's Office there was procedural jockeying, and I don't remember the scenario, but there was a bill of particulars, there was a motion to dismiss, there were arguments on various portions of the bill. Some negotiations on what the plenary hearing should include. I believe in the Clark

case they agreed that there should be a plenary hearing, and in other cases they have not.

Q. When you say agrument, talking about you and attorney generals or argument in court?

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A. Arguments before the Court.

Q. What was the outcome of the motion to dismiss?

A. With respect to certain counts that had been raised on appeal and denial by the Supreme Court, those were sustained. With respect to issues that it wasn't clear had been disposed of by the Supreme Court, they were not ruled at the plenary hearing stage.

Q. What happened at the plenary hearing?

A. Plenary hearing took two days. We put on I think 15 or so witnesses. Tried to demonstrate to the Court what evidence was available on sentencing. We concluded that there was no grounds for a plenary hearing on guilt and innocence. So we mooted the plenary hearing to sentencing and gave the Court the evidence that was there and accesible to trial council for the use in mitigation of punishment.

Q. What was that evidence?

A. Well, the evidence was -- golly, it was extensive. The mother was just barely out of her 14th year of life when she became pregnant out of wedlock to a 21 year old man. The child born was Jimmy Clark.

The wife had an alcoholic father who beat her. The father had an alcoholic father who beat him. The reason they took this union was to get of their homes.

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The boys then were continued to continue to be raised by Lil, the madam, until Jimmy was arrested on drug violations and sentenced to Jessup in Marylands.

Q. If you could summarize the rest of the evidence of the background.

Mr. Harris: The record was established in Clark to establish what evidence was presented at sentencing. I am not sure it is relevant to the issue here.

THE COURT: I am not so sure. A pretty bad situation when you sum it up.

A. The last thing that happened in Clark's life prior to the homicide of Mr. Scarborough was his brother Johnny who had gone in the Army came home and saw Jimmy who was on his way to Philadelphia to look for the mother, and Johnny was never seen again alive. His body was found with three bullets in the Potomac River.

Q. How did you learn all this?

A. Talking to people, talking to witnesses.

Q. How long did that take?

A. Well, with the efforts of Susan Geller it took six weeks or eight weeks.

Q. Did Mr. Clark ever indicate that he thought this evidence was important?

A. Mr. Clark was virtually unaware in his present mind of most of this.

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Q. Do you know any of this stuff was relevant to his post conviction proceeding?

A. He had no present recollection of many of the events. He had no awareness of any of it that was helpful to him that we could discern. And when confronted by Dr. Fallens with the gravity of the burns, he dismissed it as unimportant.

Q. What was the result of the circuit court level of this?

A. The writ was granted with respect to punishment phase.

Q. All right. What happened after this proceeding?

A. The Commonwealth appealed to the Virginia Supreme Court. And the Virginia Supreme Court reversed and ordered that Judge Shimborsky set a death date.

Q. What happened next?

A. Well, we filed a petition for a Writ of Coram Nobis with the trial court on the grounds that there was one other stage

that was left unattended by this dearth of knowledge. Had the trial judge known all of this, that he had the right to grant clemency to commute to life. The trial court said that the mandate from the Supreme Court directed him to set a date, death date, and he set a date.

Q. Did you argue the case in the Virginia Supreme Court?

A. I was present. Jacqueline Leonard, my associate, argued.

Q. To get to the Supreme Court, is that a matter of right

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form a circuit court?

A. Not on appeal from habeas. Since habeas is a civil matter, it was a petition for appeal and the Supreme Court granted the petition.

Q. On the petition is there an argument on the petition itself?

A. The petitioner has the right to argue before a 3-judge panel. And I understand that Jacqueline, from the Attorney General, did argue before the panel. We asked to be notified for the date of the argument, but we were not.

Q. What happened next after the execution date was set?

A. Well,--

THE COURT: You went to the United States District Court, the Court issues the Writ, went to the Fourth Circuit, the Fourth Circuit affirmed in unpublished opinion. Can we move along?

A. Only thing I did in addition, I sought a stay pending that.

Q. Where did you seek a stay?

A. I think in that instance, I can't be certain because at that point Miss Leonard went to Boston and another associate came to the office and I believe we may have negotiated a stay with the Attorney General's office, obtained one from the United States District judge.

Q. How far in advance was an execution date set?

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A. Matter of weeks.

Q. Where was Mr. Clark located at that time?

A. At which time he was at Mecklenburg, and then he was at Richmond. At one point before the obtaining of the stay, Clark had been brought from Mecklenburg to Richmond to be processed for execution. So it was a matter of days. At one point in these proceedings either after the initial petition for certiorari or the initial petition.

Q. How far along in the process was the execution date?

A. We got a call from the trial judge he had been notified Clark was scheduled to have his head shaved. So I take that to be a very few number of days, if not the day before.

Q. After you got that, where did you go?

A. Well, when he got habeas relief from the state circuit judge, Lee was moved from Mecklenburg to Powhatan. When the government appealed it and got it reversed he was moved back to Mecklenburg and put back on death row. When we went before the United States District Judge, he was at Mecklenburg, but when that writ was granted he was taken back to Powhatan. And he remained at Powhatan during the appeal to the Fourth Circuit.

Q. Were you appointed to represent Mr. Clark?

A. After the fact.

We were appointed on the direct appeal, and at the end

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of the State habeas matter, the trial court level, we asked to be appointed.

Q. Did the Commonwealth take a position?

A. Attorney General opposed it.

Q. On what grounds?

A. Grounds that there wasn't statutory authority for appointment.

Q. What was the result of your motion?

A. We were appointed at the conclusion of that case. At that level.

Q. All right. Were you paid for this?

A. Yes, sir, we were.

Q. How much?

A. I think there were some 7 thousand dollars in fees and some 25 hundred to 3 thousand in costs that were reimbursed.

Q. Were you aware of how that figure compares to other payments to post conviction?

A. I have heard that is the largest state habeas award that anybody has heard of, but I can't confirm that.

Q. Has representing death row inmates had any effect on you or your practice?

A. A number of them. They are very time consuming. They are very arduous. It is very difficult for an attorney such as myself who has a criminal experience, criminal trial practice experience to keep current on all of the

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developments unless you specialize and handle on an on going basis death penalty cases. It is an ulcer producing side of the practice.

It is the kind of one wrong move means somebody's life is in the balance. It is arduous on the associates who are forced to volunteer, if you will, for death penalty cases.

Their progress through the law firm in a firm our size, ranging between twelve and 18 people over the course of this case, an associate is recognized in part for their fee productivity.

You can't make partner on fees that you earn in death penalty cases. When the Supreme Court reversed the granting of the writ by the state trial judge --

Q. Virginia Supreme Court?

A. Yes. The associates who had worked on that case and argued it in the Virginia Supreme Court, I don't want to say went off the deep end, but were severely depressed.

THE COURT: Come on, now. She went to Boston and got married.

A. Sometime after that, judge, but she -- I saw, to quote a phrase, she was extraordinarily depressed by the thought what she had done at the trial court level and what she had argued on appeal had not, she hadn't been able to get the message across.

THE COURT: We should let the record show I know that

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because she was a former law clerk.

Although I don't want the record to show that her marriage depressed her.

A. I hope there is no equation between her marriage and representing Mr. Clark.

THE COURT: It is kind of hard for me to imagine her being depressed at any stage.

A. It was for me, Your Honor.

By Mr. Sasser:

Q. What about the connection with this on the firm itself?

A. We fronted and advanced whatever you want to call it, costs. People outside my litigation section of the law firm didn't understand that particularly. Mr. Clark, anybody on death row is not a very attractive client for a law firm. And now we have a guy who is convicted on a confession of a heinous crime and we are spending law firm funds to do something about it.

It was difficult internally to get authorization to do this, and yet we needed the resources to do the job correctly.

The time, collective time, you know on Clark we started Clark in '78 and we are now in 1986 and it is still going, and the collective time is in the order of 5 hundred to a thousand, I suppose, and the fees that had been put to

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representing civil clients would have been substantial.

Q. Are you able to take on another one of these cases?

A. We accepted Whitley for a period of time because we thought after Clark that we had developed a formula, because we saw in Whitley many of the same issues of the failure to establish the background of the defendant and mitigating mental abnormalities.

And we spent another couple hundred hours on Whitney. Meantime -- and we went into effectively into overload and we were able to find after a long search another attorney to take over Whitney, and then we rested for awhile and took on Washington. The Quintanna case was there, it was being handled

by people at Arnold and Porter, and Ms. Leonard was local counsel for that.

Q. Did you move for appointment in the Washington case?

A. No. No. There is an order in the Washington case after the Supreme Court of Virginia affirmed its conviction and set a death date, his then trial counsel and appellate counsel moved for appointment of counsel, and it was denied.

Q. Did he move for appointment of himself as counsel?

A. The order was that he moved for habeas proceedings.

Q. Prior to the filing of any habeas petition?

A. Yes.

Q. And was it also the same time as the execution date was set?

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A. Very same hearing. The hearing was July 31, and the death date was set as September 5. And there was no counsel.

Q. Are you familiar with the Institutional Attorneys Programs that Virginia has at its prisons?

A. In a way, I had some contact with an advisory attorney to the inmates of the Fairfax County Detention Center, and one conversation, I suppose with someone at the penitentiary.

Q. Do you know whether those attorneys appear in court on behalf of inmates?

A. To my knowledge they do not appear in court on behalf of inmates. They are advisors to the inmates in such legal matters as arise during their incarceration.

Q. Can a lawyer effectively represent a death row inmate without going to court?

A. No, sir.

Q. In getting your stay of execution did you have to argue that stay?

A. My recollection is now over three cases, and a fourth, and I can't differentiate any more between Whitney and Clark. We had to argue on one occasion for a stay. And perhaps two occasions for a stay. They stays were not automatic. We expected to get them, but they had to be argued.

THE COURT: Mr. Sasser, we are going to have to move along.

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Q. Three more questions, Your Honor.

Can a system where one lawyer files a petition and another lawyer handles the court appearances, effectively provide representation for death row inmates?

A. Mr. Sasser, on paper it might look that way. In my own judgment I don't think that you can provide effective assistance in a death habeas effort.

Q. Why not?

A. Just reviewing what we needed to do, the freedom of motion and the totality of knowledge we felt we had to have in making what we felt were esoteric judgments on a day-to-day basis about how to handle a particular matter required the attention, on-going attention of a lead attorney and people working and coordinating through the lead attorney.

Q. Can a system where the attorney advising the death row inmate changes his opinion on where the inmate happens to be imprisoned on a particular day provide adequate representation?

A. I don't see how an attorney client relationship can be established in that setting. And particularly where the attorney comes to the inmate as an agent apparent or otherwise of the institution.

Q. Is that relationship necessary?

A. Absolutely.

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THE COURT: Use the microphone.

Q. I will void that question and use the microphone. Thank you.

I am curious about the investigation that you pursued in preparing the state Habeas Corpus Petition for Mr. Clark before the time that you filed the petition itself.

Now, we do not need to go through in detail everything that you have done which you have summarized here already, but can you break down whether or not for example you had spoken to the witnesses that you eventually presented at the hearing in habeas corpus before you filed the petition?

A. I spoke with few or none of the background, that is Jimmy Clark's developmental years witnesses because we did not know their identity at that time.

Q. Was the fact that that evidence was not presented at trial specifically named as an allegation in the habeas petition?

A. No, I believe the habeas petition allegations were limited to the fact that they had not pursued Dr. Ludwig Fink. His recommendation for psychiatric, psychological.

Q. The red flag?

A. That was the red flag, and that flag is what was plead, and we procured that. And it was through our psychiatrist and psychologist that we were put on the trail of this early childhood deprivation.

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Q. The evidence you needed to make the allegation was that statement that was in the record of trial?

A. That got us started, yes, sir.

Q. And the investigation through the other psychiatrists and social history report occurred after the petition was filed?

A. Well, with the exception of the informal, except for some of the normal discovery trial counsel took place before the petition was filed.

Q. That was a matter of contacting counsel and asking them questions and they gave you information about the case?

A. Yes, sir, reinforced. Had been nothing done to follow up these recommendations.

Q. You were able to frame some allegations of ineffective assistance of counsel based on review of the record at trial and your questions informally to counsel?

A. I think that is a correct statement. We could start. We knew that there was something patent we could work.

THE COURT: It was sufficient to satisfy you under rule 11 that you could make the allegation.

A. Yes, sir, if we had been under rule 11.

Q. It is fair to say from your review of the transcript there were several items from your review of the transcript that suggested questions to you about counsel's representation at trial that were worth pursuing?

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A. Well, the only thing in addition to Dr. Fink's report was Dr. Allerton's report and the reason Dr. Allerton who was a most qualified expert, the reason he was employed was because the social worker, the probation officer who did the presentence investigation had some reservations about Clark's mental status.

So, there were issues of Clark's mental state that weren't resolved in the record.

Q. But the investigation into his mental state to bring out this evidence later did not occur before you filed the petition.

A. Some did and some didn't.

Some was before, and some was after.

Q. All right. Are you aware that the Virginia Supreme Court rules of court dealing with amendments to habeas or any pleadings has to be liberally granted?

A. Sure.

Q. Are you aware procedural rules to federal courts amendments are liberally granted in petitions?

A. I am aware of that.

Q. You indicated that you were aware that amendments to petitions had been opposed in some habeas corpus petitions brought by death row inmates?

A. Yes, sir.

Q. Which case was that?

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A. Most recent was in Earl Washington. We had filed a

motion for a leave to amend, and the Attorney General indicated that they wouldn't oppose amendment in this case. We got to a pretrial hearing, we had received a motion to dismiss the amended motion for judgment before we had filed the amendment. I am sorry, not motion for amendment, but after we filed an amendment. We said to the Court we want to file the amended petition. Not just the motion for leave to amend. And the Attorney General objected to any further amendment.

Q. Well, let me ask you. Was that the first or second amendment to the petition that was filed?

A. Our first amendment, but the Attorney General's office treated it as a second and opposed it.

Q. In the motion you filed a motion for leave to amend. Didn't that essentially contain everything that was in fact set out in the second amended petition?

Everything that was set out in the motion?

A. In the motion, pretty much, sir.

Q. I believe Mr. Wells of the office was the Attorney General responsible for that case?

A. Yes, sir.

Q. Didn't she explain to the trial court in as much as everything had already been raised in the motion that was raised in the petition and he had already addressed on the

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merits or raised the grounds of the defense against the issues he saw no further need to address the merits further, isn't that accurate?

A. That is accurate. And when we ask the Court for leave to file the amended motion itself it was objected to as a further amendment.

Q. Did the Court grant the amendment?

A. Granted the amendment.

Q. Have you ever been aware of a Circuit Court to deny amendment to habeas corpus petition in a capital case?

A. Only second hand.

Only second hand

THE COURT: I am to infer you never lost one of those motions.

A. Not to my knowledge, Your Honor.

Q. Now, you indicated that the claim was not raised in the first habeas corpus petition, it would be considered barred on appeal for failure to raise it.

And I understand your testimony to suggest that it would also be barred in further petition for writ of habeas corpus.

A. If known at the time, yes, sir.

Q. Okay. That is the qualification of the state, isn't it?

A. Yes.

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Q. Was there — there was evidentiary hearing in Clark. Was there evidentiary hearing in Whitley?

A. Yes.

Q. As far as your relationship with the Quintanna case, I understand that was tagential, but for the record Mr. Quintanna died before the petition was ruled on, a natural death?

A. Correct.

Q. In Mr. Washington's case there has not been a hearing yet?

A. Correct.

Q. Is the matter open for dispute as to whether or not there will be a hearing?

A. The Attorney General's office takes the position no hearing is necessary.

Q. It responded to the position on legal grounds only or that the factual grounds are, do not create an issue, correct?

A. I think on both legal and factual grounds they assert there is no reason for plenary hearing.

Q. Do I understand you again today to indicate that you obtained a stay at some point in the Clark case but you don't recall when the stay was obtained?

A. Applied for at several stages. A death date was set upon the trial court's affirmance of the jury verdict. And

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we were appointed on appeal, and we moved for a stay and it was granted.

Q. A stay is automatic on the statute?

A. We moved for, it was granted. If the cause was automatic, fine, but it was granted. We petitioned for a subsequent day after the Virginia Supreme Court affirmed the conviction. We got a stay conditioned upon our filing a petition for writ of certiorari.

Q. And you did in fact file a petition for certiorari and it was denied. Was there a further execution date set?

A. Before another execution date was set, if I recall, we petitioned for a further stay conditioned upon our filing the petition for habeas corpus.

Q. Petitioned for a stay, but there was no date set?

A. Before a date was set. Did you contact the Attorney General's office to discuss possibility of informally agreeing on a time to file the petition?

A. At some point we did. It may have been at that point.

Q. Was an arrangement worked out with the Commonwealth, with the Attorney General's office it would use its best efforts to avoid setting an execution date in order to have post conviction review occur?

A. That is correct.

Q. So there was in fact no execution date set after that?

A. Not until after the Supreme Court reversed and entered

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final judgment on our habeas and directed that a death date be set.

Q. At that point your firm left the case?

A. In Clark we remained in. Talking about Whitley, we were out after the appeal and denial of habeas.

Q. You indicated that you were first — as I understood you were first to appear that your client had been transferred to the state pen when the trial court notified you of the —

A. That is my best recollection.

Q. Were you aware that your client was subject to being moved to the state penitentiary two weeks before an execution date?

A. I thought it was apparently protocol by which he moved from Mecklenburg as the death date approached.

Q. And which execution date was this that he was moved to the pen?

A. It must have been the one that had been a death date set and stayed depending upon filing petition for writ of certiorari. I forget which one it was.

Q. Is this matter of where no one was advised a stay had been entered?

A. Well, I think it was a condition, it was a stay conditioned upon a filing, and the petition had not yet been filed.

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And the expiration of that, of the 90 days for the filing was approaching and Clark was brought to Richmond.

Q. This is after the reversal of the trial court on habeas corpus petition?

A. No, this is the petition for cert. in other words after his initial conviction was affirmed and a death date was set, that death date was stayed pending the filing of a petition for writ of certiorari. We had I think it was 90 days to file that. As that date approached and the petition had not yet been filed, there were anxieties on the part of both corrections officials and ourselves when we became aware that Clark was transferred, and if my recollection serves me, a conditional stay troubled correctional officials because what happened if the petition for cert. wasn't filed? What happened? What are we to do with Clark? He was brought to Richmond. That is my best memory.

Q. I guess the confusion is are you saying the Circuit Court set an execution date that would have been essentially the same date as the end of the expiration of the time to file a cert. motion?

A. In our judgment the Court did not do that, but in the judgment of the correction officials it was unclear.

Q. I understand.

On another matter, Mr. Hall, you indicated that your firm had fronted the fees for the psychological examinations

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of Mr. Clark.

Were those later, those fees later submitted to the Virginia Supreme Court in a voucher for reimbursement?

A. They were submitted to Judge Chamborsky, the habeas judge, who awarded reimbursement of most of them.

Q. So your firm fronted the money, but in fact you were reimbursed for most of the fees?

A. Yes, sir.

Q. I understand that you were appointed to represent Mr. Whitley?

A. Yes. I was called by Judge Bock after Whitley had an attorney whom I believe had been obtained by Marie Deans after a period of time but who didn't have much experience in these matters. And the judge called me to see if I would assist this attorney. Later saw an order where I was appointed without reference to the other lawyer, so I guess I was.

Q. The order you are referring to appears as Defendant's Exhibit 17 in this action. Judge Bock appointed you as counsel to represent, to prepare a petition for writ of habeas corpus for Mr. Whitley?

A. Whatever the order says, yes, sir.

Q. There was no petition filed at that time?

A. Apparently not.

Q. No petition had been prepared at that time?

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A. There was a draft circulating, I believe, at that time.

Q. But essentially someone interested communicated to Judge Bock the desire for Mr. Whitley to file a habeas corpus petition and to have counsel appointed to represent him?

A. Yes. I don't know the mechanism, how it came to Judge

Bock's attention.

Q. As a result you were appointed?

A. Yes.

Q. Your appointment continued on appeal?

A. Yes.

As I understand.

Q. Through the Virginia Supreme Court?

A. Yes.

I am not certain there was any formal order appointing us for the appeal of the denial of habeas, I know we did it.

Q. And your firm left the Whitley case after the Virginia Supreme Court appeal?

A. Yes.

Q. And there has been no motion for appointment of counsel in the Washington case since you have become involved in the case?

A. That's correct.

Q. And based upon your knowledge of Quintanna, are you aware of whether or not any motion for appointment of counsel

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was filed in connection with Quintanna's case petition?

A. I don't believe one was.

Q. As I understand your testimony in the Clark matter no motion for appointment of counsel was presented to the Circuit Court until after the evidentiary hearing?

A. That is correct.

Q. And at that time you indicated that the Attorney General's office opposed it?

A. That is correct.

Q. But the court nevertheless granted the motion?

A. That is correct.

Q. And your firm received some compensation for its effort on behalf of Mr. Clark?

A. That is correct.

Q. You indicated earlier that your aware necessary of the Virginia Supreme Court action in death cases is they had not

applied the ends of justice exception to rule 25 to consider matters in death cases?

A. I could not recall a case in which they had.

Q. Have you reviewed the cases specifically for that purpose?

A. Very frankly, after Whitley and before Washington I stopped reading the death penalty cases that came down on a regular basis. I tried most of them. It is possible there is such a case.

* * *

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A. Well, in Whitley's case from the record, again the bizarre sexual overtones of the killing. It was a killing in the course of a robbery, I believe as, if you believe as the jury did what happened, but there were bizarre features to what was done to mutilate the decedent that suggested again to me as a layman psychiatric and psychological dysfunction that needed exploration. That is where we headed after we got that appointment in Whitley.

Q. In Whitley you didn't actually conduct the hearing yourself, as I understand?

A. Miss Leonard did that.

Q. Prepare the petition yourself?

A. The two of us exchanged drafts of the petition. Back and forth.

Q. You indicated in connection with Mr. Whitley's case there was a draft petition circulated, at the time your understanding was a draft petition circulating somewhere before one was filed?

A. I think Attorney Victor Glasburg who volunteered to work on Whitley had started the draft of the petition. I am not certain.

Q. Is there — is it possible for an attorney to prepare a petition for writ of habeas corpus for an inmate without

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appearing at court on his behalf to prepare it for the inmate? Is there any bar to that?

A. No bar to it. It is not a product that is likely to be effective.

Q. Could you explain that, sir, if it is an identical petition, only difference is the attorneys name is not on it?

A. Well, while you know a great deal from the trial record and the appellate record about it, let's say the fourth and fifth amendment issues that were in that case, you don't really have a window on the 6th amendment unless, you, on the ineffective assistance issues unless you start going behind the trial and putting yourself in the shoes of trial counsel and starting as though it were from scratch and saying what was here, what could have been done and would the outcome have been different?

Now, someone can take from the Virginia Code A form petition for writ of habeas corpus and say, Mr. Jones, you are in here sentenced to death. What are the issues in your case?

And you can fill that out and give it to an inmate and say, here, file this, and you may not have to pay a filing fee, you can do go in forma pauperis.

But the issues in death penalty cases are so intricate and esoteric and frequently sophisticated that it is just not the drafting of a petition and filing it that is effective

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representation.

If the attorney who is doing that for the inmate said, and since we will learn more after we file this because there is discovery that is probably going to be made available and we may have leave to amend, and I will follow through with you, it starts to improve. But if someone is going to draft it and walk away from this inmate and say, I can't help you any further, you will need to have another lawyer to take it from here, and then perhaps another lawyer to put on a plenary hearing, then he gets moved from Mecklenburg to Richmond and he is introduced to another advisor, there is no pragmatic way in which an effective job of representing this man can take place.

Q. Mr. Hall, I am not necessarily talking about a union attorney,

talking about any attorney, any attorney can review the transcript, review the briefs, and identify error in that transcript and draft a petition on behalf of an inmate for him to file pro se, isn't that correct?

THE COURT: Mr. Harris, I think that we can save some time. Don't let me put words in your mouth. I suspect the answer to that would be yes, you can. But it is not as effective as if you actually go ahead and speak to the client and do some investigation, isn't that the essence of your testimony?

A. Yes, Your Honor.

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THE COURT: But for that the petition smells, tastes like, smells like, looks like the petition on appeal on direct appeal. There is nothing new.

It is like eating cold oatmeal.

Q. In the capacity of preparing a petition for writ of habeas corpus an attorney is acting as an attorney, is he not, and using his legal skills to research and draft a legal pleading whether for his signature or someone else, he is acting in capacity as an attorney?

A. Almost by definition the answer to that question is yes. But is it the uncle here that happens to be an attorney that got his law degree in public accountancy, or someone that can help?

Q. Based upon your familiarity with the attorney system in Virginia are you aware whether the Supreme Court ever addressed the issue of whether an attorney appointed under that statute could appear or could not appear in court?

A. I don't think they ever addressed it. I have never known of one to appear, but my knowledge is incomplete.

Q. Are you aware of any authority under the Virginia Supreme Court definition of attorneys or attorney appointed under 35 point 1-47?

A. No, sir. All I can say is I have never seen them in the pits.

* * *

TESTIMONY OF JOHNNY WATKINS, JR.

July 10, 1986

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* * *

(Witness Sworn.)

Johnny Watkins testified as follows:

Direct Examination

By Ms Geer:

- Q. Mr. Watkins, could you state your full name?
A. Johnny Watkins, Jr.
Q. Do you currently live in Mecklenburg Correctional Center?
A. Yes.
Q. On death row are right?

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- A. Yes.
Q. When did you first arrive on death row?
A. 1984 the 16th of September.
Q. You have been there almost 2 years?
A. Right.
Q. How far did you get in school?
A. 12th grade.
Q. Could you go all the way through the 12th grade?
A. No I stopped in the middle.
Q. Did you graduate?
A. No.
Well, I graduated once I got to Mecklenburg.
Q. What do you mean by that?
A. I got my G. E. D. while I was there.
Q. What is a G. E. D.?
A. A 12th grade education.
Q. Before going to Mecklenburg, what kinds of jobs did you have?
A. Well, I worked at Memorial Hospital and I worked in a few factories and summer jobs.
Q. When were you first convicted of capital murder?

- A. '84 of July.
Q. Okay. Do you know what court that was in?
A. Danville Circuit Court.
Q. What happened to your case after that?

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- A. It went before direct appeal to the Supreme Court, Virginia Court Supreme Court.
Q. What did they do?
A. They affirmed it.
Q. Then what happened to your case?
A. Well, as of now I don't know what happened to it after that.
Q. Do you know whether your case went to any other courts after the Virginia Supreme Court?
A. I think it went up, it went to another court, but I don't know exactly which one.
Q. How do you know it went to another court?
A. Well, I talked to another inmate and asked him a few steps that cases have to go through, and he told me some of the steps that it has to go through.
Q. Who told you some steps that it would have to go through?
A. Joe Giarratano.
Q. Did you understand the steps Mr. Giarratano explained to you?
A. Well, I didn't understand it, but as far as I know, a few to them I probably could remember the name. But as far as understanding them, I wouldn't know.
Q. Is your case in any court right now?
A. Not that I know of.

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- Q. Do you know what court you go into next?
A. No.
Q. Do you know what step you take next to appeal your case?

A. No.
 Q. What is habeas corpus?
 A. Well, from my understanding, I understand it is a step where you can go back to court where you was originally executed.
 Q. How do you know that?
 A. From talking to Joe.
 Q. That is Mr. Giarratano?
 A. Right.
 Q. Have you ever heard the words petition for writ of certiorari?
 A. Yes, I have heard it.
 Q. Where did you hear it?
 A. From talking to Giarratano.
 Q. Do you know what a petition for cert., of certiorari is?
 A. No.
 Q. Do you know what court that is filed in?
 A. No.
 Q. Do you know whether a petition for writ of certiorari has been filed in your court, in your case, excuse me?

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A. I don't rightly know.
 THE COURT: Hold on. I have to break in two minutes anyway for this conference call.

* * *

(Witness resumed the stand)

THE COURT: You were examining him on his legal ability.

By Ms Geer:

Q. We will start with the next series. Did you have court appointed lawyers at your trial?
 A. Yes.
 Q. Who were they?
 A. Henry Crowder and Motley.

Q. Are Mr. Motley and Mr. Crowder representing you now?
 A. No.
 Q. As best you know why aren't they representing you now?
 A. Well, they told me that once my case reached the Virginia Supreme Court they wouldn't be representing me any more.

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Q. Okay. Do you have a lawyer representing you in your appeals right now?
 A. Well, I had — I think I got a lawyer that was willing to accept my case, but as far as I know I don't know if he really accepted to go ahead and take the total responsibility.
 Q. Who is that?
 A. John Boatwright.
 Q. How did you get Mr. Boatwright?
 A. Marie found him for me.
 Q. Who is Marie?
 A. Marie Deans. She is in Richmond. She works for the coalition.
 Q. What does Marie Deans do?
 A. She helps find lawyers for death row inmates that don't have a lawyer.
 Q. Are you going to pay Mr. Boatwright to do your case?
 A. No. I don't have any money at this time to pay him.
 Q. How long did it take Mrs. Deans to find you a lawyer?
 A. Well, I have been here for about almost two years, so, I say about a year and a half.
 Q. All right. did you do anything to try to find a lawyer for yourself?
 A. No, I couldn't. Weren't no way I could.
 Q. Why couldn't you?

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A. Well, because we was — at first we were limited to a certain amount of phone calls. Then you have to know, you have

to have lawyers approved on your list before you can call them anyway.

Q. Does Mecklenburg have a law library?

A. Yes.

Q. Have you ever visited the law library?

A. Yes.

Q. How many times?

A. About 3 to 4 times.

Q. When did you first go to the law library?

A. I say about three or four months after I was at Mecklenburg.

Q. Why did you go to the law library then?

A. To see if I could look at other cases to see if they were like my case.

Q. What did you do when you got to the law library?

THE COURT: Let's save some time. I really want everybody to get lots of experience, but we have to move along. Do you know anything about researching —

A. No, sir.

THE COURT: — legal problems?

A. No, sir.

THE COURT: Did you ask the state appointed attorneys who come visit there, I take it, did you ask them for help?

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A. Well, I asked them about helping me getting a transcript of my trial.

THE COURT: Did you ask them to help you prepare any petition of appeal or anything of that nature?

A. No, I didn't know that he done that.

THE COURT: Did you ever speak to them?

A. Yes, I spoke to them.

THE COURT: And you didn't know that they did that?

A. Right.

Q. Your Honor, if I may ask a couple of questions.

Mr. Watkins, when did you first speak to one of the institutional attorneys?

A. About two months after you was at Mecklenburg.

Q. Who was that?

A. That was Montgomery.

Q. What did you speak to them about?

A. About helping me get a transcript of my trial.

Q. And what did Mr. Montgomery say to you?

A. He told me that he didn't handle that, he weren't handling death row cases, so I would have to prefer to my lawyers I had before.

Q. Mr. Watkins, why haven't you asked Mr. Montgomery for assistance in your appeals since then?

A. Because after he told me that, I figured that he didn't have nothing to do with helping none of the death row

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inmates with their cases. So I never asked him anything else.

THE COURT: Is he the lawyer that as far as you know was appointed to assist inmates?

A. Yes, sir.

THE COURT: All right.

Q. Mr. Watkins, has Mr. Montgomery, have you seen Mr. Montgomery since that first time?

A. Yes, he came to me right after this civil suit started. He came to ask me a few questions.

Q. What did he ask you?

A. He asked me did I have a lawyer, and he asked me what was my case at this time.

Q. What did you tell Mr. Montgomery?

A. I told him that I didn't know.

Q. Didn't know where your case was?

A. Right.

Q. Did he know whether or not you had a lawyer, Mr. Montgomery?

A. Evidently he knew I didn't have one because I told him I ain't have a lawyer.

Q. Did Mr. Montgomery offer to do anything on your case for you?

A. No.

Q. Did Mr. Montgomery offer to write any papers for you?

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Did he tell you why he was questioning you about this case?

A. No, he didn't say why. He just came and asked to see me. He never said why he was questioning me.

Q. Mr. Watkins, have you ever done any legal papers on your own?

A. No.

Q. When your attorneys filed the papers on your behalf, did you read them?

A. Yes, I read over them.

Q. Did you understand them?

A. No.

Q. Mr. Watkins, can you contact witnesses in connection with your appeals from Mecklenburg?

A. No.

Q. Why not?

A. Because of — well, they have to make all of the phone calls for you. And you have to have them approved, they have to be approached on the list before you can call them.

Q. Can you call any attorneys, Mr. Watkins?

A. No.

Q. Why not?

A. They have to be also approved on the list.

Q. Do you think your trial lawyers made any mistakes at trial?

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A. Yes.

Q. How would you go about proving that?

THE COURT: Never been anybody convicted that didn't think that.

Q. Sure, Your Honor.

How would you go about approving that?

A. I wouldn't be able to prove it from the position that I am in. I would need some help.

Q. Can you call your trial attorneys?

A. No, they would not accept phone calls. I tried a few times, but they wouldn't accept collect calls.

Q. Could the witness have our Exhibit Book? I would like him to look at Exhibit 18, Exhibit 18.

Q. If you could turn to Exhibit 18. Turn to page 15 of that. I believe Exhibit 18 is the Mecklenburg Orientation Manual. You can read for yourself the first paragraph on top of page 15.

A. It is two attorneys have been appointed by the Circuit Court of Mecklenburg County to assist inmates with legal matters relating to their incarceration. The procedures to get appointed with one of the attorneys will be decided with you by the unit attorney.

Q. What do you understand that paragraph to mean?

A. That if you are going to see an attorney, that you have to put in a request in the unit attorney. To work out

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somekind of schedule.

Q. What is your understanding that that attorney would do for you?

A. My understanding is help you over the law library if you need any assistance.

Q. Do you know whether those attorneys can represent you in court?

A. No.

Q. Do you know whether those attorneys can do legal research for you?

A. No.

Q. Do you know whether those attorneys can draft papers for you?

A. No.

Q. Do you know whether they can help you?

THE COURT: Do you know what the attorneys do for you?

A. Not at this standpoint.

THE COURT: All right.

Q. Mr. Watkins, do you have a copy of your transcript?

A. No.

- Q. Have you tried to get a copy of your transcript?
 A. Yes.
 Q. What did you do to get a copy of your transcript?
 A. Well, I talked to Montgomery. He told me to prefer

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back to my trial lawyers. I wrote them a few letters to see if I could get one, but they never responded.

- Q. Did you have a lawyer then?
 A. No.
 Q. No further questions.
 THE COURT: Any cross-examination?
 Would you like water?
 A. No, I will be all right.

Cross-Examination

By Mr. Gorman:

- Q. Mr. Watkins, I believe your testimony was that you have been at Mecklenburg since July of '84, or was it —
 A. No, September.
 Q. September, I am sorry. Was your transfer to Mecklenburg shortly after your conviction of the crimes?
 A. Yes.
 Q. It was. Was your case at that point being appealed to the Supreme Court of Virginia?
 A. Yes.
 Q. You had lawyers to help you with that appeal, did you not?
 A. Yes.
 Q. When you say shortly after that you asked Mr. Montgomery for a transcript?

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- A. Yes.
 Q. Is that correct?
 A. Yes.
 Q. His reply was?

- A. To prefer back to my trial lawyer.
 Q. Who were handling your appeal?
 A. Yes.
 Q. Following that conversation you had no further contact with Mr. Montgomery to request him to do anything for you?
 A. No.
 Q. Now, you say you don't know what the words habeas corpus and certiorari mean, is that correct?
 A. Correct.
 Q. Do you know whether or not they are a method or legal device to overturn your conviction?
 A. No, all I know is they are steps that you have to go through in order to try to get your conviction overturned.
 Q. I am sorry, what did you say?
 THE COURT: He said he knows they are steps that you have to go through to try to get your conviction overturned.
 Q. I thought that is what I asked, all right.
 So you do know there are methods that can be used to overturn your convictions, is that right?
 A. Right.
 Q. Now, in that connection, did you try to go to the law

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library to find out what those methods were?

- A. Yes.
 Q. On three or four occasions?
 A. Both, about twice, about twice.
 Q. Twice. Since 1984?
 A. Yes.
 Q. Do you know when your conviction was affirmed in the Virginia Supreme Court?
 A. I don't know the exact date. But I think it was this year, March.
 Q. March of this year?
 A. Right.
 Q. Now, you mentioned a person by the name of Mrs. Marie Deans. Has she been in contact with you over the years

since you arrived at Mecklenburg?

A. Yes.

Q. How many times have you meet with Mrs. Deans?

A. She came to see me occasionally, and I talked to her on the phone.

Q. What did you see her about?

A. About trying to find a lawyer for me.

Q. I see. Did she make any suggestion to you that you contact the unit attorneys?

A. No.

Q. Did you ask her about the unit attorneys?

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A. No.

Q. You say you are having trouble contacting your lawyers. Because you can't, or contacting people who might be lawyers for you, is that correct?

A. Yes.

Q. Is Marie Deans handling that primarily?

A. Yes.

Q. She was doing that, so you really had no occasion to try to contact anybody, did you?

A. Yes.

Q. You did?

A. Well, I didn't try to contact anybody. I contacted her.

Q. Contacted her?

A. Right.

Q. At Mecklenburg are you allowed to send mail free of charge to courts?

A. I think once a week you get to send a free letter, except if it is legal work, I think it can be a little bit more you can send.

Q. Can you send mail free of charge to attorneys?

A. Yes.

Q. Did you ever write any lawyers?

A. I don't know any lawyers to write.

Q. Do you know other inmates on death row?

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A. Yes.

Q. Do you know whether they meet with their lawyers?

A. As far as I know the ones that have lawyers, they meet with them.

Q. You never wrote those lawyers?

A. No.

Q. You can read and write can't you?

A. Yes.

Q. Thank you.

THE COURT: Any redirect?

MS GEER: Yes, briefly, Your Honor.

Redirect Examination.

By Ms Geer:

Q. Mr. Watkins, when you went to the law library, what did you do?

A. Well, I talked to two, I talked to a clerk that was working there and the guard that is working there.

Q. All right. This is the most recent time you went to the law library?

A. Yes.

Q. What did you talk to the clerk there and the guard there about?

A. Okay, I wanted him to help me to file my certiorari.

THE COURT: Your what?

Q. Could you repeat?

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A. I wanted him to help me file my certiorari or help me find some books where I could.

THE COURT: I am sorry, there is one word there that escapes me. Help you find your —

A. Help me file it.

THE COURT: File.

A. Help see if —

THE COURT: File what?

A. I had to to file a certiorari or something, I had to file before the court by a certain date.

Q. What happened when you asked them for help?

A. Well, he told me he had never done that. He wouldn't be able to help me, assist me.

Q. Who told you that?

A. The clerk that be working at the law library that had to hand me the books or whatever you asked for.

Q. What did you do then?

A. Well, I asked the certified guard working there could she help me.

Q. Who is the certified guard?

A. Mrs. Brown.

Q. What did she say?

A. She said she didn't know nothing about it either. So she wouldn't be able to help me.

THE COURT: You don't know whether your attorneys

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filed a petition for writ of certiorari, do you?

A. No.

THE COURT: To the Supreme Court?

A. No.

THE COURT: You don't know. They didn't tell you they weren't going to do it?

A. No.

THE COURT: They didn't tell you they were going to do it.

A. No.

THE COURT: You simply don't know, is that it?

A. Right, I don't know.

THE COURT: Have you inquired of them?

Did you ever write to them and say —

Q. Your Honor, —

THE COURT: No.

Only at home am I used to being interrupted. You go ahead and tell me.

A. I wrote them to ask them about my transcript. They

already told me that they wouldn't be representing me once they filed my direct appeal.

THE COURT: To the Virginia Supreme Court.

A. Right. All right. Now.

* * *

TESTIMONY OF JONATHAN SHAPIRO

July 10, 1986

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* * *

(Witness Sworn.)

Johnny Shapiro testified as follows:

Direct Examination

By Mr. Zerk:

Q. Please state your full name.

A. Jonathan Shapiro.

Q. Mr. Shapiro, are you an attorney licensed to practice in the State of Virginia?

A. I am.

Q. And where is your practice located?

A. Alexandria, Virginia.

Q. Would this be described as a solo practice?

A. That is how I would describe it, yes.

Q. Okay. How long have you been practicing in the Alexandria area?

A. Twelve or thirteen years.

Q. Throughout that time when you were practicing law there, was it in a either solo practice or a very small firm?

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A. That is correct.

Q. Now, as part of your practice have you had a substantial criminal law practice?

A. Yes, criminal law has been my speciality for years.

Q. Do you teach that at American University?

A. I teach a clinical program for third year students that involves trial practice. I have taught a criminal clinic as well at American University.

Q. Do you in the course of your practice stay familiar on a very current basis with developments in criminal law?

A. Do my best.

Q. At some point going back to 1982 were you contacted in reference to a death row inmate named Wilbert Evans?

A. Yes, I was.

Sometime in I believe March of 1982 I received a call from Chan Kendrick who asked if I would be willing to represent Wilbert Evans, who it is my recollection, Chan told me was due to be executed in four or six weeks.

Q. Mr. Kendrick at that time was Executive Director of the Virginia A. C. L. U.?

A. That is correct.

Q. And what was your response to his request?

A. Without hesitation, I told him no, I would not do that.

Q. All right. Did you receive any further communication

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from Mr. Kendrick?

A. Chan called me at least twice more in the following weeks, and finally, in the week before Mr. Evans' scheduled execution asked me once again and said that they had been unable to find anybody who could do it, the man was in Richmond awaiting electrocution, and I agreed to represent him at that time, but only for the purpose of getting a stay, originally, and told Chan he better keep on looking.

Q. In response to that, when you agreed to take it over, what did you do?

A. Got a stay. Within, I think it was the two or three days before he was due to be executed.

Q. What was the status where was he?

A. He had exhausted his direct appeal and his court appointed attorneys had pursued the case through a petition for cert., which had been denied.

Q. You filed in what court?

A. I filed in the Circuit Court for the City of Alexandria a state habeas action.

Q. Okay. You requested a stay at that point?

A. That is right.

Q. Was it granted immediately?

A. It was granted within a few days.

Q. At that point how close were you?

A. Just two or three days before scheduled execution.

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Q. In anticipation of that had you prepared any other papers other than the petition to the State Circuit Court?

A. Yes, I had. I had never been involved in a death penalty case. I didn't know how easily a stay would come, and I had prepared papers up and down the Court system in the event that the Circuit Court denied the stay.

Q. Now, when the stay was granted — between the time you got the case, agreed to take it, and when the stay was granted approximately how much time would you say you put in during that interval?

A. I estimate about 25 hours.

Q. Was that over a period of what, three days?

A. Yes, very few days.

A lot of that time was on the phone to various attorneys who had done death penalty work. I had never done it, I was trying to get up to speed. I was on the phone to Jack Boger, on the phone to Lloyd Snook, who I noted had done a number of cases. I was very nervous because I didn't want to make a mistake at that point.

Q. Now, subsequent to granting the stay, you had indicated that you were only going to do — well, only going to do a stay?

A. Correct.

Q. Did you continue with the representation beyond that?

A. Yes, I had further conversation with Mr. Kendrick, and

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they were unable to find any other lawyers, so I just stayed and stayed and finally it was my case.

Q. Okay. Now, subsequent to obtaining the stay, did you conduct any factual investigation?

A. Yes, I conducted a very far reaching factual investigation.

Q. Could you briefly describe for the Judge what prompted you to do the factual investigation and what the nature of it was, and what kind of people you talked to?

A. Well, I didn't want to leave any stone unturned. The first thing did —

THE COURT: You rarely do.

A. I read the record right away. I made some notes of things I thought might be possible errors in the case.

One of the things immediately was that the Commonwealth had obtained the death sentence based on evidence of prior record, and they had introduced prior or purported convictions from the past. I wanted to check those out. They were all in North Carolina.

My first efforts in the case were largely directed to confirming whether or not there were in fact such convictions. It took trips down to the clerk's office in North Carolina, phone calls, I had my clerks going down there. We eventually discovered that in fact some of these convictions had not been convictions at all. But that was

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just the beginning of the case. I felt it necessary to — the defense had put on no evidence at all at sentencing. I felt it necessary to establish what evidence was available had defense decided to take advantage of it.

I also, and that consumed many, many hours throughout the Washington area and North Carolina trying to find witnesses and interview them.

Of course I interviewed the Court appointed attorneys. I interviewed the psychologist or psychiatrist who had conducted an evaluation in the case. We had some concerns concerning that.

I had interviewed the probation officer. I interviewed the police officers. And these things bore fruit because in my interview with the probation officer, I was initially interviewing him to see whether or not there were any inaccuracy in the pre-sentence report, and I suspected there were many, and in fact there were many, but in my interview of the probation officer, he let me look at his file and I found a written report which turned out I think to be a very key piece of evidence in the case, because it established that the Commonwealth Attorney had known that these convictions were not really convictions at all.

Q. Prior to using them in the proceeding?

A. Prior to trial.

Q. Okay.

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What significance to Mr. Evans' case was the information ultimately, was the information that you uncovered by that investigation?

A. Well, that was the key to the case, because, based upon what I determined to be the true state of his criminal record, the State ended up conceding error. So without having done that investigation, confirmed those records, that never would have come to light.

Q. Now, would it be, so that we can short circuit this, and Your Honor can tell me if I am leading too much, but I will try to move it along —

THE COURT: You are.

By Mr. Zerkin:

Q. Moving it along or leading too much?

Would it be a fair statement that the State conceded error after it had waited until legislation, emergency legislation was passed by the General Assembly providing for resentencing?

Mr. Harris: I object.

THE COURT: Objection sustained. Come on, now.

By Mr. Zerkin:

Q. In the development of the case, you indicated that the State at some point conceded error. Can you tell us how that came about and when it came about?

A. Yes.

* * *

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Q. Subsequently did you get — he received a death sentence again, is that correct?

A. Yes.

Q. Did you subsequently get back involved in the case?

A. Yes. I handled his then new appeal as of right to the Virginia Supreme Court.

The conviction was affirmed, or the sentence was affirmed.

I was able — I was sort of floundering because it was taking up so much time, and was able to get a Washington law

firm involved to help me do the petition for cert. Cert. was denied over strong dissent.

The case is now back in Circuit Court, excuse me, we went back to Circuit Court to exhaust the remaining habeas claims which we had not had a chance to litigate as a result of the State's concession of error. We lost. The case is now on appeal from the denial of state habeas to the Virginia Supreme Court.

Q. How much time would you say that you put in on Mr. Evans' case to date?

A. Well, it is in excess of 5 hundred hours. That is my best guess.

A. I never kept records because I didn't realize there was provision to be paid in these cases, and I am still not sure there is.

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When I filed the original habeas petition I asked to be appointed to represent Mr. Evans largely because I thought that that would help us as far as witness fees and things like that.

The Commonwealth standing in for the A.G. it is my recollection objected vehemently to us being appointed. At which point I say, I don't care if I am appointed or not, I am just going to do the case.

Q. Now, what effect did your handling Mr. Evans' case have on your practice?

A. Well, I believe it had a very serious effect on my practice.

THE COURT: Whose case did you say?

Q. Wilbert Evans.

THE COURT: I thought you said something else.

A. I was -- the amount of work that faced me, I thought was enormous. It was enormous. It took a lot of my time and effort. As a result I know that I turned away a number of cases that I otherwise would have taken. It exhausted my staff, various law clerks and secretarial help, and that was our case for the better part of a year.

Q. And did you suffer any out of pocket costs?

A. I spent, I didn't keep track of it, Mr. Zerkin, but I know I spent a great deal of money in pursuit of this case out of my own pocket.

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Q. Now, would you do another one?

A. Never.

Q. Would in your opinion —

THE COURT: You mean you want to quit while you are a thousand percent, is that it?

A. I don't know if I am ahead or behind now, Judge.

Q. Would in your opinion based upon your knowledge of Mr. Evans' case and issues raised in it, would Mr. Evans, and when you got involved would Mr. Evans be alive today if he had relied on an institutional attorney who could prepare pleadings for him to file pro se?

Mr. Harris: Objection, Your Honor.

THE COURT: Objection sustained. Let me ask you this.

Suppose somebody came and wished to retain you as private counsel and could afford to pay you. Would you view it differently, would you accept it?

A. That would take care of one of the problems in the case, the fact that it was such a financial burden. However, it is an emotional burden as well. For that reason alone I don't feel as though I would ever take another one.

THE COURT: Well, I take it then you would accept the death, possible death case, capital murder case. Would you accept that at the trial level?

A. I don't know.

THE COURT: Have you ever tried any?

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A. I haven't tried any at trial level. No, I have not, not tried any.

Q. In your opinion does Mr. Evans have a reasonable chance of success on his present habeas petition?

A. Absolutely.

Q. And what is the relationship between the meritorious issues in his present habeas petition and the factual investigation that you have conducted?

A. My factual investigation was the key to his case. If we eventually prevail, which I think we will, it will be because it was determined that we discovered that those convictions were improper, they weren't real convictions at all.

Q. Is the allegation, the Commonwealth Attorney's knowledge of that, your discovery, was that relevant to the issues?

A. I believe that.

Q. That you were able to succeed on?

A. I believe that could well be a successful point in Federal Court. I don't know, I just can't say, but I think that certainly will be a big point.

Q. That is all I have, Your Honor.

Cross-Examination

By Mr. Harris:

* * *

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* * *

Q. As you discovered this information you were getting from North Carolina, you amended twice?

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A. That is my recollection.

Q. This wasn't available at the time you filed the first habeas corpus petition, was it?

A. No, it was not.

Q. Now, this is information that you developed based on talks with your client at that time based on review of the trial transcript?

A. Certainly based -- well, based on review of the transcript I realized that I wanted to check out the validity of the purported convictions that were used at the sentencing phase.

Q. You raised the question about that in the amended petition even though you did not investigate it substantially at all?

A. That is correct.
 Q. And based on what you had available to you, the trial transcript?
 A. Yes.
 Q. Available to you the briefs filed on direct appeal?
 A. Yes.
 Q. Did you have available to you the certiorari petition?
 A. Yes.
 Q. Did you have available to you the order of the Virginia Supreme Court?

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A. The order of the Virginia Supreme Court.
 Q. On direct appeal?
 A. The Supreme Court decision? Yes, I do, published opinion.
 Q. Was there also an order from the Circuit Court dealing with sentencing?
 A. When the Circuit Court imposed its original sentence, that was embodied in an order, and certainly that was in the Court's file. I reviewed it.
 Q. You reviewed the Court's file?
 A. Yes.
 Q. All before you filed the petition?
 A. Yes.
 Q. This is time between March 22 and April 9 of '82?
 A. It was in much shorter time than that.
 Q. Okay.
 A. Well, let me, so there is no mistake, what I did prior to filing the petition as far as it goes was simply to review the papers in the Clerk's Office in the Circuit Court of Alexandria. I never met Mr. Evans. I doubt that I had even spoken to him at that point.
 Q. You filed the petition without even speaking to him?
 A. Yes.
 Q. You never inquired of him what issues he might have noticed from trial?

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A. There wasn't time.
 Q. Did you talk to trial counsel before you filed your petition?
 A. I don't believe I did.
 Q. Okay. At the time that you were preparing your petition had you received or requested from anyone information particularly geared towards a habeas corpus petition in a capital case?
 A. Yes.
 Q. Who did you inquire of?
 A. Jack Boger.
 Q. Did he provide you with any information?
 A. Yes.
 Q. Did he give you sample pleadings?
 A. Yes, he did.
 Q. Did you talk to any other attorneys who may have handled a capital habeas case?
 A. Yes.
 Q. Did they provide you any sample pleadings?
 A. At least one other did.
 Q. Okay. After you had your petition filed in the Circuit Court, as noted you filed amended petition without objection of the Attorney General's Office?
 A. That is my recollection.
 Q. There was a second amended petition?

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A. That is correct.

* * *

TESTIMONY OF DENNIS DOHNAL

July 10, 1986

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* * *

(Witness Sworn.)

Dennis W. Dohnal testified as follows:

Direct Examination

By Mr. Sasser:

Q. Tell us your full name?

A. Dennis William Dohnal.

D.O.H.N.A.L.

Q. You are Lawyer, Mr. Dohnal?

A. Yes, I am.

Q. Where?

A. Here in Richmond, Virginia.

Q. What is name of law firm?

A. Bremner, Baber and Janus.

Q. How long have you been there?

A. Approximately twelve years.

Q. What is nature of your practice?

A. Primarily criminal, approximately 75 percent of my practice is criminal.

Q. Have you had experience with capital cases?

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A. Yes, I have.

Q. What is that experience?

A. I tried one in the trial level that did not actually go to trial. Ended in a plea. I am presently engaged on a habeas corpus level representing one Charles Sylvester Stampford.

THE COURT: Move that mike a little bit closer to you, Mr. Dohnal.

A. Yes, sir.

THE COURT: Thank you.

Q. Did you move for appointment in the Stampford case?

A. I did, yes.

Q. Where did you move?

A. In the Henrico Circuit Court before the late E. Ballard Baker.

Q. What was the nature of your motion?

A. At that time I asked to enter the case on a volunteer basis. I sought reimbursement only for costs and expenses.

Q. Did the Commonwealth take a potion regarding your motion?

A. They did.

Q. What was that?

A. They objected to the request for reimbursement for expenses. I had already informed them, of course, I would not be seeking compensation.

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Q. What was the outcome of the motion?

A. The Judge granted the motion and allowed for reimbursement of expenses and costs within the discretion of the Court.

Q. Could the witness please refer to Exhibit 33?

Is this the order appointing you?

A. It is.

Q. Does it reflect a position taken by the Commonwealth?

A. It does.

Q. How so?

A. Parenthetical expression following Mr. Nance's signature, which reads, objected to as to costs for defendant.

Q. Could you in just one sentence tell us what the status of this case was, where it had been before you got it?

A. No, I cannot.

Q. Two sentences?

A. I doubt that as well. Had involved procedural history. It had just been remanded from the Fourth Circuit Court of Appeals to the District Court for the dismissal on a prior habeas corpus review.

It was back before the Henrico Circuit Court with my involvement in filing a second petition for writ of habeas corpus.

Q. This order appointing you, was this before you filed

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the petition for writ of habeas corpus in the state court?

A. It is dated one week to the day after I actually filed it.

This resulted from a chambers conference that occurred on July 9 of 1984 one day before I actually filed the petition. I obviously had to become counsel of record in order to file the petition.

Q. Where is Mr. Stampford's case now?

A. In the Court of Appeals, only the second running of the so-called state ladder on habeas review. I entered the case May 30 of '85. It is still pending before the Court of Appeals. Argued. We filed a motion in conjunction with the Attorney General's Office to certify the case to the Supreme Court of Virginia to try to expedite the matter.

Q. How much time have you spent on Mr. Stampford's case?

A. I would estimate at least 250 hours.

Q. Can you tell us what you would normally be compensated for in a case of this nature?

A. Never having been retained on a capital case, but nevertheless I would estimate I would not be inclined to accept such a case for less than 50 thousand dollars, at least.

I was taught well in that regard.

And I suspect my senior partner and others would have a different opinion as well.

Q. What is the effect of this case on your practice?

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A. That is perhaps the most dramatic effect or most damaging effect so to speak in terms of I feel unfair to my partners and associates, it has consumed so much time and effort even at this early stage, and we are only partly down the road, and I feel it is unfair to the rest of my firm who have to assume greater responsibilities in terms of cases and such that I, of course, would have taken.

Q. Do you plan to take another case like this?

A. I am sad to say I would not volunteer for one on employment basis, although I have found it very difficult to decline a Judge's request to do so. But I would not seek one out, at least on employment basis.

Q. Are you a member of any professional organizations?

A. Yes. I am a member of the Federal Bar Association, the National Association of Criminal Defense Lawyers, Virginia

State Bar, the Richmond Bar Association, the Richmond Criminal Bar Association, the Virginia Trial Lawyers Association, I believe that is it.

Q. Did you mention the Board of Governors of the Criminal Law Section of the Bar?

A. That is part of the Virginia State Bar. I was on the Board of Governors and Chairman of the Board of Governors of the Criminal Law Section of the Virginia State Bar 1983-'84.

* * *

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THE COURT: That is not an issue in these proceedings. It is not helpful. But, you know, we are spending an awful lot of time trying to show, — before I say that I want to know what Mr. Dohnal's breaking point is, 51 thousand would you take?

The Witness: I could be persuaded, Your Honor.

THE COURT: Well, the point is, I am serious.

A. Yes, sir.

THE COURT: It is the money. It is the burden that is put upon you and your associates to accept these cases more than anything else, is that what are saying?

A. As far as I am concerned, yes, sir. I am also very much aware of the, as it has been called, the emotional strain and all that on other trial counsel. Quite frankly, my primary concern would be the burden on my colleagues.

THE COURT: Well, that is because you are, I suspect, because the nature of your practice is that you have already stated is 75 percent criminal so you are not as queasy about handling them as some lawyers might be.

A. Perhaps, Your Honor.

THE COURT: Let me say this to counsel. I don't want to abort these proceedings, you have spent a lot of time. I did my best yesterday, so it is on the record, so it doesn't

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make any difference, I offered to recuse myself because my son is

now in the Attorney General's Office. You all said, no, so you are stuck.

But the fact of the matter is, Gentleman, and the record should show, I know it is difficult to get counsel to participate in death habeas cases. The record ought to show that I know that. Because I tried. I have called around. And I have asked lawyers to help. And it is very difficult to do it. I know that.

Now, if that calls for a recusal because I know that of my own knowledge, because I have tried, I got on the phone, I dialed and dialed and dialed.

I didn't meet, well, I met a lot of reticent lawyers, who had vacations planned in Europe or some such thing, but it is a fact. I know that is a fact. Now it — if it is wrong for me to know that, speak up and I will be glad to abort the case and let somebody else try it, but you are not going to find a Judge with any experience at all that isn't going to reach that conclusion. I mean, we are kidding ourselves. It is difficult to get — it is sometimes difficult to get counsel to try those type of cases on a trial level. Absolutely one of the best trial lawyers in the City of Richmond that did a lot of criminal work, I bet you I tried 25 murder cases for him because he just psychologically did not want to handle death cases. They are tough. I

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understand that.

Now, I have said my say. If you think somebody else ought to hear it, you know I am not going to take offense. Tell me.

Is it the State's position that it is not difficult to get counsel? I am not saying that you may not have other — there may be availability, through other means, I am just talking about trying to get counsel to volunteer.

Mr. Gorman: We don't have any problem with that.

THE COURT: You don't have any problem. I didn't think you did, Mr. Gorman. I don't know why we are spinning our wheels. We don't need these 50 thousand dollar lawyers coming in here telling me it is difficult. We know it is difficult.

Q. Your Honor said it better than I could, or perhaps

better than the witnesses. In that event, I will let the defendants cross-examine.

THE COURT: Any cross-examination?

Mr. Gorman: No. One question on the record.

THE COURT: Use the lectern, then.

Cross-Examination

By Mr. Gorman:

Q. Mr. Dohnal, perhaps I wasn't paying good enough attention there for a minute. As far as your court appointment in Henrico, had you agreed not to petition for

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fees?

A. Yes, I had, Mr. Gorman. I frankly did not want to keep the time sheets and all that, and I recognized that I was entering as a so-called volunteer, and did not want to confront that particular problem.

Q. I notice Mr. Nance's signature on the back of the order at the end of it. Was there a representative from the A.G.'s office there?

A. There was. I had been in touch with Mr. Bagwell. I don't recall other than there was perhaps a logistical problem with Mr. Bagwell being present that afternoon at those chamber conferences, actually this was on the occasion of Mr. Nance moving for establishment of the execution date. He withdrew that request when I appeared with petition in hand ready to file.

* * *

TESTIMONY OF TIMOTHY KAINE

July 10, 1986

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* * *

(Witness Sworn.)

Timothy Kaine testified as follows:

Direct Examination

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By Mr. Zerkin:

Q. Please state your full name?

A. Tim Kaine.

Q. You are an attorney barred in the State of Virginia?

A. Yes.

Q. Mr. Kaine, briefly, —

THE COURT: An attorney barred in the State of Virginia?

Mr. Zerkin: I will hold my ground on that.

THE COURT: All right.

A. That is correct.

Q. How long have you been practicing in Virginia?

A. I was licensed to practice in October of 1984.

Q. Prior to that did you serve as a Clerk in the 11th Circuit Court of Appeals?

A. I did. I served as Clerk to Judge Lanier Anderson of the 11th Circuit from August of 1983 until August of 1984.

Q. In connection with that clerkship did you have to do any work in relation to death penalty law?

A. The 11th Circuit is an active circuit for death penalty cases, and our Court had a number of cases in chambers during the time that I was there.

Q. Were you involved in those?

A. As a law clerk, yes.

Q. Have you done any other work related to death penalty

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law?

A. During my time in Law School I spent one summer

working with N.A.A.C.P. Legal Defense Fund in New York on their capital punishment project, and in addition as a third year student I wrote a note for a student law review on a death penalty topic.

Q. Where did you graduate from law school?

A. From Harvard.

Q. At some point were you asked to assist in the representation of an inmate on death row?

A. I was.

Q. Who was the inmate?

A. The inmate is Richard Whitley.

Q. And who contacted you?

A. I had made known to Chan Kendricks of the A.C.L.U. I would be willing to serve, to assist someone in representing and inmate on death row. Shortly after that I got a call from an attorney in Northern Virginia, David Frudello, who had been working on a case with Mr. Whitley. Mr. Whitley's predecessor counsel left the state and they asked if I would take over the case.

I declined initially saying that I would like to help someone on the case, and I would look for someone to take perhaps initial responsibility and I could assist. I had handled —been licensed about four months at that time. I

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could not find anyone in that short period of time, and it seemed that, you know, the man needed an attorney. So I said I would do it.

Q. By the way, what firm do you work for?

A. Little, Parsley, and Cluverious.

Q. How many attorneys in that firm?

A. Ten attorneys, five partners and five associates.

Q. What was the status of Mr. Whitley's case when you became involved in it?

A. When I signed on for Mr. Whitley he had, his case had already proceeded through trial and direct appeal and already proceeded through the state habeas court at the Circuit Court level.

A petition for appeal had been filed in the Virginia Supreme Court, and oral argument on that petition was eminent when I signed on.

Q. Had it been scheduled yet?

A. It had not, but shortly after I agreed to take the case I received notice that the Supreme Court wanted to have oral argument on a petition.

Q. Did you argue that?

A. Yes, I did.

Q. And what was the result on the petition for appeal?

A. The Virginia Supreme Court refused to take the case on appeal, finding no error.

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Q. And, you filed I believe a petition for rehearing, is that correct?

A. Yes.

Q. Was that denied?

A. It was.

Q. All right. Did you have any contact from the Attorney General's Office after you — after the petition for rehearing was denied?

A. The petition for rehearing was denied in June of 1984 or 1985, excuse me. And shortly thereafter I did receive a call from Mr. Richard Smith, who is one of the Attorney General's in the state. Kind of introducing himself because he was on the other side in the case.

Also mentioning that if I — that at the time he called me he said that he would ask the Commonwealth's Attorney in Fairfax County, the county where the case had originally arisen, he would ask him not to schedule an execution date if I would file federal habeas corpus papers within a period of time, either 30 days or 60 days or 90 days.

I interpreted that to mean that I should file federal habeas instead of going for cert. to the U.S. Supreme Court. And I said I would not do that. Instead, I filed a cert. petition.

Q. What happened after you filed the cert. petition?

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A. I filed a cert. petition in September, early September of 1985.

Within a week, or it could have been maybe a day or two before I filed the cert. petition I received note that the Commonwealth Attorney had scheduled a hearing before the Circuit Court of Fairfax County to set an execution date for my client.

Q. I take it at this point the time for filing a cert. petition in the Supreme Court had not yet expired when you were notified of that hearing?

A. I can't recall. I filed the cert. petition before time had expired, but it was not very long before time expired. And these things happened right about the same time.

Q. So it was either immediately after you filed or immediately after you filed?

A. That is correct.

Q. And do you know when that hearing took place?

A. The hearing I believe was on September 16.

Q. Okay. And what occurred, what was the position of the Commonwealth, and what occurred at that hearing?

A. Commonwealth wanted to set an execution date as quickly as it could for Mr. Whitley. I pointed out that a cert. petition was pending in United States Supreme Court and that I had plans to go into Federal Court for federal habeas

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corpus immediately after disposition of the cert. petition.

Q. He had never been in federal habeas corpus?

A. That is correct. The Commonwealth's — I then I believe requested no date be set for execution, and just allow me to file in Federal Court. Commonwealth's Attorney's position was that I would get a stay in Federal Court, but there was need for a date in order to make me file federal papers quickly.

Q. Had you indicated any intention to delay?

A. No.

Q. All right. What was — what did the Judge do?

A. The Judge agreed with the Commonwealth's Attorney, told me that I would probably get a stay in Federal Court, and set the execution date for December 16, which was 3 months from that date, September 16.

- Q. Okay.
Was the cert. petition denied?
- A. Yes, on about the 10th of November.
- Q. So that was just over a month before the execution date?
- A. Yes.
Thereabouts.
- Q. What did you do next?
- A. Within two weeks I believe I filed a federal habeas corpus petition in the District Court here in Richmond.

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- Q. Had you been —
- A. And also requested a stay of execution.
- Q. What had you been doing while the cert. petition was pending?
- A. That 2-month period?
- A. Was involved in a number of — I had been working on the federal habeas corpus petition for which I had a good model in that the state habeas corpus petition had been very thoroughly done by predecessor counsel. I had been wrong on that, and also had a number of other cases going, including a significant litigation here in this Court.
- Q. And you, do you know when it was that you filed your federal habeas corpus?
- A. I believe it was around the 24th or 25th of November of 1985.
- Q. The scheduled execution then was December 16?
- A. Correct.
- Q. What other collateral papers did you file with the federal habeas corpus petition?
- A. Motion to proceed in forma pauperis, obviously, because client was indigent and application for stay of execution.
- Q. What happened next in that litigation?
- A. The stay of execution, the application for stay was immediately denied in the District Court. They set an

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expedited briefing schedule asking Mr. Smith, my opponent, to

spend his Thanksgiving weekend drafting a comprehensive brief in response to my federal habeas petition, and then giving me a four days to respond to that, I believe, or five days, something like that.

- And then scheduling oral argument in the Court, in court on merits of the habeas corpus petition for December 10.
- Q. That is six days before the execution date?
- A. That is right.
- Q. That all took place as you have outlined it?
- A. It took place. Argued before the Court on December 10.
- Q. During that time did you have any assistance from anyone else in working on it?
- A. When I had originally taken on the case I tried to find someone to help, and he had been unsuccessful. Probably in September at some point I was able to convince an attorney in town to agree to help with the federal habeas corpus. I think I had completed the cert. petition. His name is Tom Wolf. Frankly the time pressures were so great from finishing a particular litigation I had at the end of November to filing federal habeas petition that I did all that myself and it was only after the expedited briefing schedule had been set that I contacted Mr. Wolf. He began

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- helping me on trying to arrange for possible clemency proceedings, but was not involved in the briefing at the District Court level.
- Q. All right. Any other members of your firm assist you?
- A. A couple of the associates did some critical proof reading for me, and my secretary stayed late a lot.
- Q. Did you prepare any papers once you found out about the expedited schedule, did you prepare any other papers for any other courts?
- A. Well, I began thinking about possible outcomes and began thinking about papers I might need for the Fourth Circuit. I was able through a suggestion and through a favor I had done earlier to find an attorney in Washington who agreed to work on cert. petition papers in case I lost both District Court and Fourth Circuit.

Q. Were you preparing yourself for the Fourth Circuit papers at that point?

A. Pretty much.

Q. What was the outcome of the hearing on the tenth of December?

A. District Court denied the stay. Denied the petition for habeas corpus relief and dismissed it on the merits and denied a cert. of probable cause to appeal.

Q. Thank you. I take it, was there an evidentiary hearing?

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A. There was not. There had been an evidentiary hearing on one issue in the State Court.

Q. What did you do next?

A. Well, I immediately noted an appeal the same day, December 10. The Fourth Circuit assigned an emergency panel to the case. The panel asked that I appear along with Mr. Smith in Abingdon, Virginia on the morning of December twelve. The night of December 10 and December 11 I worked on papers for the Fourth Circuit filing a brief arguing for a stay, arguing for certificate of probable cause. Filed that on the 11th and went down and had the argument before the Fourth Circuit on the 12th.

Q. You flew down to Abingdon?

A. Yes.

Q. What was the outcome of that hearing?

A. The panel acting per Judge Widener, the Fourth Circuit agreed to grant certificate of probable cause pending appeal because the execution date was only four days away. Also granted a stay.

Q. Did they subsequently set up a briefing schedule?

A. Yes. I believe an expedited briefing schedule, but yes, they did set that up.

Q. Do you know approximately how much time you spent on this case during that two-week period approximately culminating in the hearing on December twelve?

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A. Between the second of December and December twelve

I probably, from examining my billing records I have down as billed around 140 hours.

Q. Can you tell us about how much time you spent on the case altogether?

A. Currently it is approaching 4 hundred hours.

Q. Who paid for the plane ticket to Abingdon?

A. I did. I hope to seek reimbursement from the Fourth Circuit on that.

Q. Okay. And do you know how much that cost?

A. That was about 3 hundred dollars. And then the briefing in the Fourth Circuit, which I also paid for, is over 2 thousand dollars.

Q. Now, were you faced with a waiver problem in your case on Mr. Whitley's behalf?

A. Yes.

Q. Was that central to the dismissal of the case in the District Court?

A. It was. Many claims which had been raised in the state habeas corpus petition had not been included in the petition for appeal to the Virginia Supreme Court. The argument that was made by Mr. Smith and accepted by the District Court was that that was a waiver under *Wainwright v. Sikes* that had no excuse.

* * *

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A. Judge Williams.

THE COURT: Did he write an opinion?

A. Yes. After he announced the verdict from the bench, later that day he issued about a 35-page opinion on the case.

THE COURT: Thank you.

By Mr. Zerkin:

Q. During the last week or two, the time period that you have talked about, where was Mr. Whitley?

A. He had been moved from Mecklenburg to the A. basement or death chamber at the prison here in Richmond.

Q. Did his being at the penitentiary in Richmond being that close to execution have any effect on you?

A. Yes. It was a very emotional time.

I visited him a number of times there.

Q. Did you have to take any steps in terms of dealing with him in order to work on his case?

A. I felt at the time that it was probably a good idea for both he and I if I were to go visit even briefly once a day. He was having no other visitors essentially up until the end so I did that. I felt that was necessary for the case initially, but as it got down to the crunch of last few days trying to get the stay it became impossible to do the physical amount of work that needed to be done absent completely detaching myself from the reality of the A. Basement.

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Q. And did you in fact detach yourself from it?

A. Yes.

Q. That is all I have, Judge.

THE COURT: Any cross? Would you like water?

A. No, I am fine. Thank you.

THE COURT: Any cross?

Mr. Harris: Yes, sir.

Cross-Examination

By Mr. Harris:

Q. Mr. Kaine, you were substituted as counsel of record in the Virginia Supreme Court in April of 1985?

A. That's correct.

THE COURT: Do you know how come you were asked to? He had counsel. Did counsel decide he didn't want to handle it any more?

A. My understanding of this is that previous counsel for Mr. Whitley had left the state without informing him.

THE COURT: I see.

A. And that the firm that was handling that case had another case, and they didn't want to keep two cases.

By Mr. Harris:

Q. At the time you first took the case, what information did you have available to you? Was information turned over to you from the law firm in Northern Virginia?

A. Yes.

* * *

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A. I don't think I would do two of these cases at once, both for emotional reasons and also because I am kind of low on the totem pole where I am, and although it is encouraged in one sense, it is a drain on other people in the firm.

If I eventually win this case and I no longer have this case, I think it would take me a while to get to the point where I would take on a second. But I guess I feel kind of like the way Denny said earlier, if somebody twisted my arm, like a Judge, an emergency situation I might find it hard to be — to say no, but it would be a difficult thing.

* * *

TESTIMONY OF MARIE DEANS

July 10, 1986

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* * *

(Witness Sworn.)

Marie Deans testified as follows:

Direct Examination

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By Mr. Landers:

Q. Would you please state your name?

A. Marie Deans.

Q. Are you currently employed?

A. Yes, I am.

Q. By whom are you employed?

A. Virginia Coalition.

Q. What is the Virginia Coalition? Is that its full name, by the way?

A. It is the Virginia Coalition on Jails and Prisons.

Q. What is the Virginia Coalition on Jails and Prisons?

A. Among other things, we are a group that recruits and assists attorneys for appellate death cases on appeal, pretrial tracking. We monitor all death cases in the State of Virginia. The federal opinions, other state opinions that might be relevant to Virginia. I guess that is all that would be of interest to this.

Q. When was the Virginia Coalition formed?

A. In January of 1983.

Q. Why was it formed?

A. Because there were a number of people who perceived a real crisis, a looming crisis in Virginia.

Q. In what respect?

A. In respect with death row cases that nobody in Virginia seemed to know who was there and who had attorneys and where they would get attorneys if they needed attorneys.

Q. Referring now to men on death row?

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A. Yes, I am.

Q. What is your position at the Virginia Coalition?

A. I am Executive Director.

Q. What are your duties as Executive Director?

A. In relevance to this case my duties are to monitor all cases, all death cases in Virginia from pretrial on through the appeals.

To assist where possible the trial attorneys, to recruit and assist attorneys who volunteer, appellate attorneys, to carry out the appeals.

Q. When did you first become involved in death penalty work?

A. When my mother-in-law was murdered by an escaped convict in 1972.

Q. How did that lead you into doing what you are doing now?

A. We spoke against the death penalty for that man, and we became known throughout the State as a victim's family speaking out against the death penalty. And appellate attorneys and people who worked with men on death row in South Carolina called us and asked us to help them, which I began doing work with appellate attorneys there and counseling death row.

Q. Did you work in South Carolina?

A. Until I came to Virginia. I worked in South Carolina

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until 1983 when I came here.

Q. When did you begin your employment with Virginia Coalition?

A. In January of '83.

Q. What did you do upon coming to Virginia and beginning work with the Virginia Coalition?

A. Well, first thing I did was try to find out who was on death row, who had attorneys, who didn't have attorneys, and who might need attorneys.

And in trying to get that information, I contacted a number of organizations that I thought might have that information. I contacted the Legal Defense Fund, the A.C.L.U. of Virginia or anybody I could think of.

I contacted the Virginia Supreme Court and eventually contacted Lloyd Snook and Joe Giarratano. Through that

process finally found out names of attorneys who had been on these cases, and then I began calling them. Too often I would find an attorney would say I was on that case two years ago, but I don't know what has happened to it now.

It was a long process and a difficult process. I finally found who was on death row, who had attorneys, where their cases were.

Q. Once you had collected that information, what did you do with the information? What did you next do?

A. Well, I next began to try and find the usual thing

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that we do in states that have death penalties, a pool of appellate attorneys. That didn't work here.

So I just began to call people and talk to attorneys through names that I had gotten from other attorneys. Would you take a death case, you know. There are men coming up who are going to need an attorney, would you do it? Would you do a cert. petition or a habeas.

Just kind of searched throughout Virginia and D.C. looking for attorneys whose arms I might be able to twist at the very least.

Q. This process, did you contact the Virginia State Bar?

A. I contacted members of the Virginia State Bar who were in some authority in that bar.

I also asked the Virginia State Bar, if I have the exact correct organizations, I sometimes get them confused, for a list of attorneys, and they told me I could have it for 15 cents a name. But I didn't have the money to get that.

Q. Well, in the course of your attempts to recruit attorneys did any attorneys turn you down?

A. Yes.

Q. Is it fair to say most attorneys turned you down?

A. Yes.

Q. What reasons did they give you when that he declined your offer to represent a death case?

A. They gave me basically two reasons.

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The first was the financial burden on their firms. These were mainly the names that had been given to me, and the people that I talked to were a lot of sole practitioners that had these cases and a lot of people like Gerry that two or three other people in their firm. And they told me stories about little firms going bankrupt and stuff like that.

That they simply could not stand the financial burden. Also a number of them recognized the emotional burden as well.

Q. Well, let's start with the period of 1983 to '84 roughly speaking. Did you succeed in finding lawyers for any inmates during that period?

A. Yes, I did.

Q. How many lawyers did you find, and for how many inmates?

A. Can I refer to my notes?

THE COURT: Yes, ma'am.

Q. The Court is not prohibiting you, so you can.

A. Okay. I found 18 attorneys nor nine cases.

Q. I am a little confused. You say 18 attorneys for nine cases. That is more attorneys than there are cases. What is the reason for that?

A. A lot of attorneys would come in and do the cert. petition, but wouldn't do the habeas. Had to do another.

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Denny Dohnal that testified was an example. Once the cases moved to a certain point then that attorney, the attorney before Denny said he could not do it any more, and Denny came on.

Q. Was there any change in the nature of your recruiting efforts or the success of your recruiting efforts beginning in late 1984 early 1983?

A. Yes.

Q. Could you describe that for the Court?

A. Well, it became increasingly difficult to find attorneys. Where I had been recruiting attorneys five days a week, from 9:00 to 5:00 or 6:00, I began to have to recruit attorneys 7 days a week for twelve or 14 hours a day.

We were coming down to dead lines with no attorneys.

The attorneys were more and more resistant to taking the cases, and it just seemed like we had sort of moved through Virginia and taken that for whatever was there. I started having to go further and further afield. I went from Virginia all the way up the East coast looking for attorneys.

Q. Now, Your Honor, what I propose to do next with the Court's indulgence relates to that chart you see mounted there, which appears as plaintiffs exhibit one in the exhibit binder. I thought that chart might be of some convenience to the Court and the witness in following this testimony.

* * *

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A. With one small quibble it does.

Q. Well, we may as well hear about the small quibble in this case.

A. In a case you have listed, Poyner I, my records reflect that I did not find a cert. attorney until late July. You have early July.

Q. What did you do to check on the accuracy, confirm accuracy of Plaintiff's Exhibit 1?

A. I checked my monitoring records and the files of the men listed in this.

Q. From the period January 1, '85 through July 1 of 1986, let's call that the relevant time period for purposes of our discussions, were you attempting to find counsel for any of the inmates listed on Plaintiff's Exhibit 1?

A. I am sorry. Would you give me the time period again?

Q. Sure. The period set out in the chart 1985 to pretty much as we stand here today. Were you trying to find lawyers for any of the inmates whose names are listed on that chart?

A. I was trying to find lawyers for all of them.

Q. What did you do to try to find lawyers for them?

A. I contacted over a hundred attorneys. I contacted the D.C. Pro Bono Bar, the Legal Defense Fund, the Southern Prisoners Defense Committee, Attorneys in Georgia, if you believe that. Attorneys in South Carolina, Attorneys in

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North Carolina. All the way up through New York. I went to

large firms, I went to anybody.

Q. Did you contact the press at all during this time period?

A. Yes, I did.

I was not having any success. I did go to the press, I gave interviews to the press about the problem.

Q. Miss Deans, did you succeed in obtaining a lawyer for any of the inmates who are listed on Plaintiff's Exhibit 1?

A. Yes, I did.

Q. Perhaps we might go down the chart starting with Mr. Jones. Did you find a lawyer for Mr. Jones?

A. Yes, I did.

Q. When did you begin looking for a lawyer for Mr. Jones?

A. I began looking for a lawyer for Mr. Jones as soon as he was affirmed by the Virginia Supreme Court. I found —

Q. When was that, ma'am?

A. I am sorry, November 30 of 1984.

Q. So he is off the chart to the left?

A. That is right, yes.

Q. When did you find a lawyer for Mr. Jones?

A. I found a lawyer to do the cert. petition in early February of '85, and I continued looking for a habeas attorney, and finally found a habeas attorney in June.

Q. Do I understand your testimony correctly then, are you

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testifying that you were looking for a habeas attorney for Mr. Jones from late November of 1984 through June of 1985 and just succeeded in finding him one in June of 1985?

A. That's correct.

Q. Let's go to Mr. Tuggle. Did you find an attorney for Mr. Tuggle?

A. Yes.

Q. When did you begin looking for an attorney for Mr. Tuggle?

A. I actually began looking for Mr. Tuggle quite early because I worked with his trial attorneys, and I knew the issues, which helped to find an attorney. I knew a young attorney who

had worked on a case, assisted on a case with these same issues, so I had I began getting ready to —

Q. When did he first start looking though?

A. I think it was while he was indirect appeal.

Q. Could you give us a date on that?

A. I can't give you exact date.

Q. When did you succeed in obtaining an attorney for him?

A. In February of '85 this attorney agreed to take the case.

Q. Okay.

A. He is staying on as habeas attorney.

Q. The next time is Mr. Washington. Did you find an attorney for Mr. Washington?

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A. Yes and no.

Q. Perhaps we will come back to Mr. Washington.

Mr. Edmonds, did you succeed finding an attorney for Mr. Edmonds.

A. Yes, I did.

Q. When did you begin looking for a lawyer for Mr. Edmonds?

A. When he was affirmed in April, April 26 of 1985.

Q. Sorry.

A. I found a cert. attorney for Mr. Edmonds in late July of '85, and continued looking for habeas attorney which I finally secured in the first of December of '85.

Q. So from May of '84, May of '85 through December of '85 you were searching for a cert. habeas attorney for Mr. Edmonds, and you didn't succeed in finding one until approximately December of '85, is that correct?

A. That is right.

Q. The next name on the list is Poyner One.

Q. When did you begin looking for an attorney to represent the inmate in the action marked Poyner One?

A. He also was affirmed April 26, and I began looking for an attorney for him on the same date that I did Mr. Edmonds.

Q. When did you obtain an attorney for him?

A. In Poyner One I obtained a cert. attorney in late July of 1985. Continued looking until late August of '85.

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Q. In late August of '85 you obtained an attorney to handle his habeas proceeding?

A. That is right.

Q. The action marked as Poyner Two, when did you begin looking for an attorney in Poyner Two?

A. The same day, April 26.

Q. Did you find an attorney to represent Mr. Poyner in One and in Two?

A. That is another yes and no, I am afraid.

Q. We will come back to that.

A. Okay.

Q. The next name on the list is Mr. Boggs. Did you find an attorney for Mr. Boggs?

A. No. Well, yes and no, again. I am sorry.

Q. Okay. Mr. Watkins, did you find an attorney for Mr. Watkins?

A. Yes.

Q. When did you begin looking for Mr. Watkins?

A. He was affirmed mid June of '85, and I began looking then. I found cert. attorney the first of November of '85, and continued looking, found a habeas attorney the first of June of this year.

Q. Is it your testimony then that you searched for an attorney to represent Watkins for a period of one year before you were able to locate one for Mr. Watkins?

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A. Yes.

Q. Final name on the list is Mr. Wise. Did you obtain an attorney for Mr. Wise?

A. Yes.

Q. When did you begin looking for an attorney for Mr. Wise?

A. He was affirmed the 26th of November of '85.

I found an attorney early January of this year to do the cert. petition, and then in late May found an attorney who would do the habeas petition.

Q. Let's go back to Mr. Washington for a moment if we could. When I first asked if you found a lawyer you said, yes and no. Could you expand upon that answer, please?

A. Well, I found an attorney for Mr. Washington after his scheduled date of execution. That is not the way we want to do this.

Q. Could you describe how that came about?

A. Yes. Johnny was, I mean Earl was among those that, Earl Washington was among those that I was looking for beginning in November of '84. He was in that group. That was when I was making the efforts and contacting the hundred attorneys, contacting attorneys all over, going to the press doing everything I knew how to do. I couldn't find an attorney for Johnny. I mean for Earl. And then they put, they gave him a date of execution. I didn't, still didn't

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have an attorney. They put him in the death house. I still didn't have an attorney, and your firm finally volunteered to stay up for four nights and do a habeas so that we could possibly get a stay of execution for Earl Washington.

After that occurred, was when I finally found an attorney who would take his case.

Q. Do you know if Mr. Washington asked for appointed counsel?

A. Yes, Mr. Washington did ask for appointed counsel.

Q. He asked the Court for appointed counsel?

A. He asked the Court.

Q. Do you know whether the Court did in fact respond favorably to his application for appointed counsel and grant him appointed counsel?

A. The Court denied him a stay of execution.

THE COURT: I am sorry. Would you repeat the answer?

A. It was the same hearing, Your Honor, they denied him an appointed attorney and set a date of execution at the same hearing.

THE COURT: Did he file a pro se habeas?

A. His trial attorneys requested court appointed counsel for him, for his habeas.

THE COURT: Well.

Q. Your Honor, sorry.

THE COURT: Go ahead.

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Q. If I may, if Your Honor would turn to Plaintiff's Exhibit 22, I believe Your Honor will find a copy of the order which Miss Deans is referring to.

Would you also look at that.

A. I don't have Exhibit 22.

THE COURT: Well, it is simply the order setting the date of execution. Points out that attorney for the defendant moved the Court for appointment of counsel to represent the defendant in a habeas, which motion was denied.

What I am trying to find out is the trial attorneys would not handle the habeas, I take it.

A. The trial attorneys had gone through cert., Your Honor, and they didn't — they just felt like they couldn't go on with the case.

THE COURT: Well then, they withdrew, in effect.

A. Yes.

THE COURT: I mean I am getting confused with this. You need an attorney for trial, and you need an attorney for cert. and you need an attorney for habeas. When I practiced law you took a case, you kept the case.

A. That is the way I would like it to be, too, Your Honor.

THE COURT: I gather that is not the system any more.

A. It isn't — that it isn't the system, it is just that attorneys will unvolunteer in this situation. Will come in

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and do one thing, and I then — they want me to find somebody

else. They don't want the case as a whole for ever and ever.

THE COURT: Well, what you are, if I understand correctly in fairness to counsel, when counsel accepted in the beginning, they do it under conditions that they are only going to handle it up to a certain point, is that fair?

A. That is right, yes.

THE COURT: All right.

Well, did he ever, didn't he file a pro se petition for habeas, Mr. Washington?

A. Earl Washington? No. Mr. Snook entered appearance and filed it for him.

THE COURT: So he did go through the habeas procedures.

A. Yes, sir.

By Mr. Landers:

Q. Miss Deans, let me direct your attention to the chart, the entry next to Poyner Two.

I asked you earlier whether you found a lawyer to represent Mr. Poyner in Poyner Two, and you said, yes. And could you explain that answer?

A. Well, I never did find an attorney who would file Mr. Poyner's cert. petitions on time, and a week before they were due to be filed in court I asked Mr. Giarratano on death row if he would do Mr. Poyner's cert. petitions.

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Q. He is a death row inmate?

A. Yes.

Q. Did he in fact draft a cert. position for Mr. Poyner? Is Giarratano a lawyer?

A. No, he isn't.

I then after that time period found a habeas attorney for Mr. Poyner.

Q. With respect to Mr. Boggs whose name appears next on Plaintiff's Exhibit Number 1, I ask you if you found a lawyer for him, and you also said yes and no. Could you explain that answer?

A. Just the reverse of Mr. Boggs. I did find an attorney

who agreed to do the cert. petition, and I actually thought he might stay on for habeas. But he moved his practice to Florida, and I am still looking for a habeas attorney. Mr. Boggs has no attorney at all.

Q. When did you begin looking for a lawyer for Mr. Boggs?

A. Again, June 14. He was in that with the same group as John Watkins.

Q. When did you obtain a lawyer for Mr. Boggs for cert. petition?

A. The first of November of '85. You have to note not obtained lawyer for habeas corpus.

I have not.

Q. So we are clear on this, you do attempt to recruit a

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lawyer to handle the entire proceeding as the judge suggested?

A. Absolutely. That is the way I want it to be.

Q. And sometimes you can't succeed in that endeavor, so if a lawyer is willing to handle cert., you take him and try to find somebody to handle the rest?

A. Yes. Rather than loose the right to go up on cert.

THE COURT: Well, let me ask you.

When counsel are appointed in a state court, do I understand that after they have taken it to the Supreme Court of Virginia that they are relieved of any further responsibility.

A. Yes, sir.

THE COURT: Do they seek to be relieved, for example in this court once you are in you are in, there is no quitting until the judge let's you go.

I want to be sure now, as I understand it, they don't have to take cert., all they have to do, I gather, is tell the defendant you have a right to petition for cert. and then that is the end of it of their responsibility.

A. That is right. If they take, if the original trial attorney take up cert., he is doing it as a volunteer attorney.

THE COURT: He doesn't need leave of court to withdraw.

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A. No, sir.

THE COURT: But he does up until the point he takes it to the Supreme Court of Virginia, I take it.

A. That is right.

THE COURT: All right.

By Mr. Landers:

Q. I wonder if I might straighten out one matter that has arisen. Since my colleague tells me there may be some uncertainty to it, and we have some knowledge since it was Paul Weiss that drafted habeas papers for Mr. Washington as the witness has testified. At the time appointment was denied counsel in Mr. Washington's case at July 3rd, order that Your Honor has, there was no habeas petition filed at that time. I would like that to be clear.

Paul Weiss filed a habeas petition, drafted the habeas petition one week before the execution date simply because Mr. Washington was then a class member and we felt we had an obligation to do what we could to protect his rights. But that is the scenario of that. Is that consistent with your recollection, Mrs. Deans?

A. Yes.

Q. Are there any other death row inmates who may soon require post conviction legal representation?

A. There are five who are in direct appeal.

Q. Who are they?

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A. Joseph Paye, Coleman Gray, Gregory Weaver, David Pruitt, Walter Correll and anyone that comes after them.

Q. Based upon your experience, will you be able to find volunteer lawyers to represent all of these men?

A. I am afraid not.

Q. Will you be able to find volunteer lawyers to represent any of them?

A. I just can't answer that.

Q. Why not?

A. There are a number of reasons.

As I have told you, it is getting harder and harder to find attorneys.

I am competing now and having to go out of Virginia. I am competing with 18 hundred other people on death row who need attorneys as well.

So that when I go to New York or I go to Chicago or I go to Philadelphia, 14 states have been there before me. They need their own attorneys.

I don't know where the attorneys are, if I find out I will find them, but I just don't know where they are.

Q. To your knowledge has anyone other than you and the Virginia Coalition in Virginia attempted to recruit volunteer lawyers for death row inmates?

A. No.

Q. Has the Virginia State Bar assisted you in attempting

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to find volunteer lawyers for death row inmates in Virginia?

A. No.

Q. Have you ever contacted the Virginia State Bar to ask for their help?

A. Many times. Through letters to members of the governing board, I have been to a meeting of the governing board of the criminal law section, I have stayed in constant touch with their membership, I have gone — I wrote Mr. Patterson, who was — he is not Virginia State Bar, he is the Bar Association.

Q. He is Virginia State Bar for these purposes?

A. I wrote him asking for his assistance. And I don't know what — he told me he called me on the phone and said I will do what I can to help you, and then his firm and Hunton and Williams at Mr. Patterson's request took Poyner one, two, three, he actually has three cases, but that was it.

Q. Has the office of the Attorney General assisted you in finding counsel for death row inmates?

A. No. On the contrary.

Q. Could you explain your answer?

A. Well, just that they evidently have a policy of opposing

any of the attorneys that I recruit or anyone else recruits to do this work, opposing their being appointed or getting costs.

Q. Has anyone in the Attorney General's office told you

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they have such policy?

A. Mr. Kulp told me that.

Q. When did he tell you that?

A. I think probably about 1984. I am not sure when that conversation took place.

Q. Other than Mr. Washington's case, are you aware of any instance in which the Attorney General's office has opposed appointment of volunteer counsel?

A. Yes. I am aware of — I have a lot of hearsay, but just in my own records I have two orders, one where they oppose John Lowe being appointed on Michael Smith, and another one where they appointed — where they opposed Allen Clark being appointed on Willie Leroy Jones case.

THE COURT: When you say opposed, if somebody volunteers, I suppose the opposition goes to the state being responsible for costs, isn't that what it is as distinguished from appointing counsel? I want to be sure we don't leave the impression, unless it is a correct impression, that the Attorneys General's office does their best to keep people from getting counsel.

A. No. Just from getting costs.

THE COURT: Cost. That is what we are talking about.

A. Yes.

By Mr. Landers:

A. But that makes it a lot harder to recruit attorneys.

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A. I understand that.

Q. Miss Deans, what is the financial condition of Virginia Coalition at the moment?

A. Well, it is always precarious. In 1984 I had to run it out of my bedroom. In 1985 they couldn't pay my salary for five months.

In 19, later on in earlier this year, we had to close down for five weeks. We now have a little over a thousand dollars in the bank. That is it.

We expect that sometime between now and the middle of August we will get another 19 hundred dollars, but that is absolutely all we have at this point.

Q. Is the Virginia Coalition likely to remain in business?

A. Well, there is a God, maybe he will drop some money down to us, I don't know.

Q. If the Coalition were to close its doors today, how would death row inmates in Virginia get volunteer legal assistance for post conviction proceeding?

A. I don't know. I have asked a number of organizations to take on this task. We are having terrible financial crisis before, and simply haven't found anybody that is willing to do the work.

Q. Can death row inmates find volunteer lawyers themselves?

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A. No.

Q. Why not?

A. Well, I heard earlier they suggested they could write letters, but they don't even have a phone book. How can they find out who to write? They can't call anybody. They can't call another man's attorney. They have no way of reaching the attorney or knowing who might — who might take cases.

Q. To your knowledge since you have been in Virginia, that is from January of 1983 to the present, has any death row inmate written or filed a pro se habeas petition?

A. Not to my knowledge.

Q. I have no further questions, Your Honor.

THE COURT: All right. Cross examination?

THE COURT: Did you have anything to do with the preparation of exhibit one?

A. This chart?

THE COURT: Yes, ma'am.

A. It came from information from —

THE COURT: I want to be sure that I understand it.

What does the solid black line, at least maybe it is different over there, what does that represent? I don't know what it represents. The broken line I see is apparently —

* * *

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A. Yes.

Q. With relation to Mr. Poyner, I believe Poyner Two when you were going over the chart, I believe you indicated that you asked Mr. Giarratano to draft a petition for certiorari. Is that correct?

A. That is correct.

Q. Had you provided Mr. Giarratano with manuals and other draft pleadings and things of that nature to help him do that job?

A. Yes, I did.

Q. You still have those things, or ones like them, manuals, draft pleadings and that sort of thing? Do you have a library of those?

A. No. I have one copy of everything. If somebody needs it, I run a copy off on my sick machine.

Q. Now, in regard to Mr. Poyner, are you familiar with an individual by the name of Harry S. Montgomery?

A. Yes.

Q. At the correctional center. Is he not court, the institutional court appointed attorney for Mecklenburg Correctional Center?

A. Yes, he is.

Q. Have you had any contact with him either before or since this Poyner Two decision to file a petition for certiorari?

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A. I have been in contact with Mr. Montgomery since not too long after he was appointed to Mecklenburg.

Q. Did you ask Mr. Montgomery to draft a petition for certiorari for Mr. Poyner?

A. No. Mr. Montgomery had told me he didn't know anything about capital cases.

Q. When did he tell you that?

A. He told me that probably in one of the first conversations that we had.

Q. That was the reason that you asked him not to get involved?

A. I didn't — I never asked him not to get involved. On the contrary.

Q. You did not ask him to get involved for that reason because he indicated to you that he had no knowledge of capital cases?

A. I believe that I in fact tried to get in touch with Harry at that time. And I just didn't get in touch with him.

Q. So you were going to ask him, but it just didn't materialize?

A. I was going to ask anybody.

Q. All right. In your recruitment of volunteer lawyers, the fact that a person has no experience in capital cases, that doesn't stop you from asking him to handle a case, does it?

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A. No, it doesn't.

It often stops him from taking them though, unfortunately.

Q. As a matter of fact, with respect to Mr. Montgomery you have provided him with copies of legal defense manuals and materials concerning death row cases, have you not?

A. I have provided him with as much information as I can, and written materials, legal defense fund manuals, sample briefs, sample motions, anything that I knew would be helpful to him.

Q. When we are talking about manuals, Mrs. Deans, are we referring to a manual produced by the N. A. A. C. P. legal defense fund?

A. That is one of them.

Q. Is another one a manual prepared by Mr. Bausky from Alabama?

A. Yes.

Q. Does Mr. Montgomery have copies of both of those manuals?

A. He should have, yes.

Q. Were these provided to him before or after Mr. Poyner?

A. Before.

Q. All right.

Now, these manuals, what do they describe?

A. They describe basically habeas procedures and issues.

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Federal, I should say.

Q. Do they deal with capital cases specifically?

A. Yes, I am sorry.

Q. Did Mr. Montgomery indicate to you that he would be willing to learn?

A. Yes, he did, that is why I asked if he would. And he said, yes, and I sent him the manuals.

Q. Since he told you that, have you recommended to any death row inmate that they contact Mr. Montgomery concerning the preparation of petitions for certiorari or petitions for writs of habeas corpus?

A. I have recommended to men on death row they contact Mr. Montgomery, but not for those particular petitions, because he told me that he couldn't represent them.

Q. All right. So the fact that he could do no more than help prepare the petition deterred you from contacting him?

A. No. You misunderstood me. I said I have told men on death row to see Mr. Montgomery and talk with him about various steps of their appeals procedure and other problems that they have, but I have not told them that he can represent them. ~~Because he told me he couldn't.~~

THE COURT: Did he give you a reason?

A. Yes. Your Honor, I believe he gave me two. One, for security reasons, and one that as he understood his appointment, he could not do that.

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THE COURT: I see.

Q. When we are using the word "represent" do we mean represent in court? Is that what you mean by that term?

A. I don't know what he meant by it. I took it to mean that he couldn't represent these men. And in fact when I did ask him to do like motions, I always approached him with, Harry, are you going to get in trouble if you do this for me?

Q. What did he say?

A. He said, well, I will just type it up and take it over there and let them sign it.

Q. So he had no reluctance to do that typing it up, handing it over there and having them sign.

A. Not if he was able to go over there. He wasn't always able to go at the time.

Q. Well, if he did that with a motion, you haven't asked him to do that with a petition for habeas corpus?

A. No, I have not.

Q. I don't know what it is, I think the record is going to be a little unclear as to what quote "it" is.

Let's define "it."

A. I am sorry.

Q. It being the preparation of a petition for habeas corpus with a blank and a signature of the inmate?

A. Have I asked him to do that?

Q. That is correct.

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A. No.

Q. You mentioned the policy of the Attorney General's office concerning opposing the appointment of volunteer attorneys. Do you know what the policy of the Attorney General's office is if a petition is filed pro se with the court and subsequently a motion for the appointment of counsel is made?

A. No, I do not.

Q. With regard to the policy you say exists, is it not a fact that courts have upheld that theory and have failed to appoint or refused to appoint those individuals as the attorney of record?

MR. LANDERS: Objection, she is not a lawyer.

THE COURT: Well, no, she may know, that is not a

legal thing. He is not asking for a legal opinion, he is asking if he knows as a fact.

A. Ask it again.

Q. What I am trying to get at, Mrs. Deans, is, whether or not the courts have upheld the position of the Attorney General's office in opposing the appointment of the volunteer lawyers as appointed lawyers in those cases?

A. The Circuit Courts you are talking about?

Q. And Federal District Courts.

A. I don't know whether the Federal District Courts have upheld that.

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Q. How about Circuit Courts in Virginia?

A. Some have, some have not.

THE COURT: I don't think you are going to find a Federal District Court that is going to refuse to appoint anybody who is willing to be appointed in one of these cases, simply because we don't like to burden the Bar in habeas matters, but, every district judge I know of welcomes counsel. It is much easier than dealing with a pro se client. Which is terrible.

Q. I missed the last remark.

THE COURT: It is easier, I think you will find, speaking for this district, if anybody is willing to volunteer we are delighted to have counsel. Because it is much easier to deal with the case than it is to deal with a pro se petition.

You agree with that, don't you? And Mr. Gorman, we ought to get it straight now. I want to be sure the record shows that when we are talking about the state opposing the appointment of counsel and a court acquiescing in that or sustaining that opposition, I take it that that happens, it is because of appointment of counsel carries with it a responsibility on the state to pay costs. Isn't that what we are talking about?

MR. GORMAN: That is what we are talking about.

THE COURT: We are not talking about a judge that says

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oh, no, eventhough you have a volunteer, I won't let him appear.

MR. GORMAN: Correct.

THE COURT: I want to be sure there is no misunderstanding about that. We are talking about money.

MR. GORMAN: We are talking about money.

THE COURT: Big money sometimes, 30 or 40 dollars.

MR. GORMAN: Still sounds like a lot to me.

THE COURT: It can be.

A. I will take it.

By Mr. Gorman:

Q. Just one other point. You have before you I think the exhibit book. Would you turn to Exhibit 22 once more, please, Miss Deans. Exhibit 2 is an order dated July third of 1985 in which Mr. Washington's trial counsel made a motion apparently for appointment of counsel and was refused.

Was Mr. Washington's counsel indicated in that order as retained at that time?

A. John Richard, I am sorry.

Q. Would you read the first column of lines?

A. Retained counsel, yes.

Q. Thank you.

MR. GORMAN: That is all I have, thank you.

THE COURT: Any redirect?

MR. LANDERS: No, Your Honor.

* * *

TESTIMONY OF GLENN E. BLAZEK

July 10, 1986

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* * *

(Witness Affirmed.)

Glenn Blazek testified as follows:

Direct Examination

By Mr. Zerkin:

Q. Please state full name?

A. Glenn E. B. L. A. Z. E. K.

Q. Mr. Blazek, you served in the capacity of court appointed institutional attorney for the penitentiary, is that correct?

A. Yes, that is correct.

Q. Okay.

You have been a lawyer since when?

A. I was admitted to the Bar in October of 1982.

Q. Okay. Have you been in private practice since then?

A. Yes, actually technically beginning January first of '83 is when I began private practice.

Q. Sole practitioner?

A. Yes.

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Q. What is the nature of, what has been the nature of your practice?

A. Approximately 50 percent residential real estate and 50 percent civil litigation or criminal work.

Q. How many felony jury trials have you done?

A. None.

Q. ☒ How many felony trials have you had, felony cases have you had that have come to trial?

A. Actually come to trial, I would say approximately 5. I cannot exactly tell the number, but I will give you as best I can recollect.

Q. Okay. Have you ever prepared any petitions —

THE COURT: I understood him to say he never tried a felony.

A. A jury.

THE COURT: Oh, a jury.

Q. Have you ever prepared any petitions to the intermediate Court of Appeals of the Virginia Supreme Court?

A. No.

Q. Have you ever prepared any — have you ever represented anyone in a habeas corpus action either in state or federal court?

A. Yes. I represented one person this past year.

Q. What court was that in?

A. Richmond Circuit Court.

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Q. Was that a retained case?

A. No, court appointed.

Q. When did you assume responsibilities at the penitentiary?

A. As best I can recollect, within six months of when I started practice.

Q. Who were you appointed by?

A. Judge Nance.

Q. Of the Circuit Court City of Richmond?

A. Correct.

Q. At that time were there any other attorneys who were working at the penitentiary in that capacity?

A. At that time as far as there are two other attorneys for total of three. Myself, I was a new attorney appointed, there was another new attorney appointed, and an attorney that service the previous year was reappointed to serve as chairman with us.

Q. Okay. Were you familiar with the experience, legal experience of those attorneys in a general sense?

A. Sure.

The other attorney was in practice like myself as far as under a year. The attorney who was the experienced attorney had been in practice two years, perhaps.

Q. Is that —

A. Two or three.

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Q. Is that the lady attorney, the one that had been there

already, and I forget the term, but the supervisor?

A. Chairman.

Q. How long after you were appointed did he stay there?

A. He stayed there that first year, and then I was appointed chairman. And that would be the second year.

Q. He is gone, do you know?

A. Right.

Q. Are there any other attorneys at the present time?

A. One other attorney, J. Speer. This year. Myself and J. Speer.

Q. Do you know that Mr. Speer became a member of the Bar?

A. The exact day and year I am not sure, but I am pretty sure it has been within the last two years that he has been a member of the Bar.

Q. Okay.

THE COURT: Are you compensated for this work?

A. Yes, sir.

Q. How much? You get paid by the hour?

A. That is a loose way of saying it. As far as technically, that is correct. As far as there is an allotment, as best I understand, of 30 dollars per hour. That is not really correct, as far as what factually happens, but, —

Q. Could you explain to the Judge why that is not

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factually correct?

A. Well, it is not factually correct because when I first started, re-emphasize the time I have been there, it is a minimal situation as far as we are supposed to see an inmate and just give him advice to be kind of like a talking law book. We are supposed to substitute for a decent law library. So if an inmate asks us if we know the answer, we relay them while we are there seated with the inmate. Something we have to research, of course we have to go to the law library and do that. But, it was a minimum time commitment as far as — and Judge Nance specifically said as best I can remember, I am positive of this, Judge Nance said this, as well as the Deputy Clerk, and as well as the court appointed attorney before me re-emphasized before I joined the thing, is

that if we had to spend over an hour on a single inmate, that we had to get permission prior to doing so from Judge Nance.

Now, the problem comes in as far as saying this 30 dollars per hour, well I guess that is technically true, but you aren't supposed to — you don't control, you know, the amount of time you put into it as far as — and I have on occasion put in a time voucher for an hour and a half and just, you know, it slid through as best I can tell on the time sheets. I didn't divide it to find out if I got paid for it or not.

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And also, too, as far as I ask Ron Belton what about travel time.

Q. Who is Ron Belton?

A. Deputy Clerk.

Q. Of the Circuit Court City of Richmond?

A. Right. He and Judge Nance coordinate this. And obviously Ron Belton is just somekind of assistant to Judge Nance and saves some time for him doing, you know, minor details.

He basically said, well, if you have travel time to and from the penitentiary, and to be honest it is very common you wait an hour and a half for them to bring the first person down, sometimes you wait between people like an hour between each inmate contact. He said, if there are times then we could bill that extra time into an hour. So frankly what that means, I am hard to follow, but frankly what that means is if we see an inmate for 15 minutes, you know, an hour or so could be claimed as far as if it took us 45 minutes just to get to the point of seeing the inmate.

And I hope that is clear as far as what I am trying to communicate. It is not set up to spend a whole hour on each inmate, eventhough technically they say don't spend more than an hour, but it takes so long to see the inmate and get there it is not an hour per situation. It is like 15 minutes.

Q. Is there — what is the most time you ever put in of

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actual work on a case for an inmate at the penitentiary?

A. I would say probably three hours. Yes, I would say about three.

Q. When you meet with the inmate and the inmate tells you what his problem is, what do you do for him then?

A. Well, I would say as far as — it is open ended.

Q. Let me narrow it. If an inmate consults you about some issue in his criminal conviction, what would you do for him at that point?

A. Well, depends on his question. What basically it is a question that is a legal issue, I can answer just by talking with him, and I would say as far as 60 percent, I am using loose figures, but trying to answer the questions as best I can, 60 percent of the issues are things, 70 percent are things where someone asks you a specific question and you can relay a specific answer as far as it is, is that something that is going to be legally objectionable as far as if they raise it on a petition for writ of habeas corpus, or is it something that is — their not going to do much for them.

Q. Do you take the questions they raise and every do research on them?

A. Yes.

Q. When you do the research, then what do you do?

A. Mail it back. Someone wanted the rules, Supreme Court Rules as far as criminal procedures. Mail it off. That part

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of the code.

Q. Do you copy cases for them?

A. Yes, absolutely.

Q. Okay.

Now, do you prepare any court pleadings?

A. No. None.

THE COURT: Now, is that because it is your understanding you are not supposed to, or simply it hasn't happened?

A. It is my understanding as far as I am not supposed to, because a locally — as far as it practically you have hour to spend with an inmate, it is ludicrous for the judge to expect you to draft pleadings, research and talk to the inmate in that time frame?

THE COURT: Don't misunderstand me. You would never get out of there if you drew pleadings for everybody that wants to have a pleading. I wanted to be sure your understanding is you are not supposed to draw the pleadings.

A. Absolutely. And that is, — yes, sir.

THE COURT: Now, are you available to death row inmates?

A. Of course. As far as like someone in segregation, anyone that would ask, yes. The guards escort me down there, and I would of course be available.

THE COURT: Is it your understanding that you are

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permitted to tell them the procedure, for example, a man says cert. has been denied, where do I go from here? Can you tell him?

A. Yes, sir. As far as — exactly.

Q. Do you ever review the trial transcripts for error?

A. I don't review a whole trial transcript, no. In other words, just given the time constraints, if someone comes to me with a transcript, you know, that is four inches thick or six inches thick or whatever, or whatever size transcript, if there is specific issues that they feel that are viable, I ask them for instance to narrow down part of the transcript. And of course that narrowed down part of the transcript of course I would be glad to review, and I have in the past.

Q. Have you ever been — first of all, could you describe the system of how you are contacted by inmates or how you find out that an inmate wants to see you?

A. Okay. The procedure has been from when I was appointed up until recent history, up until this past year really, the inmates would write a letter saying, you know, please, I would like you to come to the penitentiary and see me. And it is my understanding as far as the names of the attorneys are posted on bulletin boards, and I know counselors, know that the system is available so if an inmate talks to a counselor, they can get our name as well.

And generally as far as — because the time factor

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usually — well, the practice is that you wait until you have enough requests to justify a whole day affair, which is what it takes once you start going down there. That means anywhere from five to six, four, five, six, you know, written requests.

Q. Have you ever to the best of your knowledge been asked to see a death row inmate at the penitentiary?

A. I never have as far as to the best of my knowledge, no.

Q. Okay. You have never in fact seen a death row inmate at the penitentiary to the best of your knowledge?

A. That is correct.

Q. Were you aware at any time that an inmate, Earl Washington, was in the death-house in A. basement?

A. I don't think so. But again, I could have known something from the newspapers, but, I don't have a specific recollection.

Q. No one at the penitentiary told you he was there, did they?

A. No, no one was pointed out like that.

Q. Did anyone at the penitentiary or anywhere else indicate to you that you should see Mr. Washington?

A. No, absolutely not.

Q. Could we have the witness be given the first volume of exhibits, please.

* * *

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Q. Have you ever seen that document before?

A. Sure, when I was first appointed at the penitentiary.

Q. Who gave it to you?

A. Ron Belton, Deputy Clerk.

Q. And has anybody told you that at any time whether this memorandum or these policies are not still in effect?

A. No, no one has ever said anything past giving it to me and saying these are things you should review as far as how this system is set up and how it works.

Q. 13, if you could look at that also?

A. Yes, and twelve and 13, same things. Were given at the same time.

Q. Okay.

About how much time do you spend per month on the penitentiary inmates?

A. I would say as far as an average of ten hours. In other words, a full day. Because it takes a about a month at least in the past history to accumulate these written requests that would be four or five in number, or six in number.

Q. Given the demands of your private practice, would you be in a position to devote as much as 30 hours to one prisoner's case in a week?

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A. No, I wouldn't be able to devote it to one of my clients in a week as far as a normal clients.

Q. Okay. Now, was there some time this past year when the penitentiary was not being regularly serviced by yourself or the other court appointed attorneys?

A. Sure. Last summer was a time period in which there are three attorneys appointed at the time and none of them, include myself, went to the penitentiary for those three months or so. I am guessing three months.

And just as far as at that point, we were just burned out. One person, apparently her life had been threatened so she was in the midst of resigning. The other person for reasons unknown was not answering the requests, and I was not going down there because out of sheer burn out. And then we picked up again in the September, if I recall.

THE COURT: Well, did you have requests to go?

A. Yes, sir.

The questions did not stop, as far as I know.

Q. Do you perceive yourself as having an attorney client relationship with the inmates that you see at the penitentiary?

A. Absolutely not.

Q. May I have one minute to confer with counsel?

THE COURT: Sure.

MR. ZERKIN: That is all, Your Honor.

* * *

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* * *

A. No, sir.

Q. At any time?

A. No, sir.

Q. Have any of the other court appointed attorneys submitted vouchers in excess of one hour?

A. I am not sure as far as the people who are current with myself, but I know the attorney that was serving before me who I first found out about the program, I know he had like at least one occasion in which he did in fact ask Judge Nance for permission for more than that hour, and he was — he ended up spending I thinking six or something, and that was, and he was given permission to do so. But I am not sure of anyone concurrent with me.

Q. When we talk about permission with Judge Nance, is this something you went before him to seek permission to do, or permission that if you did it you would get paid?

A. I am sure it is if you did it you would get paid.

I was, obviously you can do whatever you want to with your own time.

Q. Did Judge Nance prohibit you or tell you that you couldn't draft legal pleadings?

A. A specific prohibition was not given on that topic, although the nature of the job seemed that that was clearly not our role, but there was no specific prohibition outlining

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that specifically.

Q. Let me direct your attention to Exhibit 13 if I may in the book?

A. Sure.

Q. Would you turn to that, please?

A. Okay.

Q. You say that you were given this document shortly after you were appointed?

A. That is correct. Well, concurrent with my appointment.

Q. Would you go down to the third paragraph. I think it is the second sentence beginning with the word "assistance."

A. Okay.

Q. Do you see that right there?

A. Yes, sir.

Q. Can you read it, please?

A. Assistance in these two areas may include either actual preparation of petition for writ of habeas corpus or complaint filed under 42 U.S.C. 1983, and of course it follows from there.

Q. Right.

Now, does that conflict with what you just told us about directives or understandings that you had about preparing legal documents?

* * *

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Q. Now, that doesn't tell you not to prepare a petition, does it?

A. In some ways it does. It says.

Q. It does so in spite of —

A. It says you are to assist prisoners with the preparation. In other words, it doesn't say you are prepared. What you are to do is Y., which of course implies you aren't supposed to do X., which is a further degree of actually working on a petition for writ of habeas corpus.

And just the time factor and the fact that we are supposed to substitute for a law library it is clear law books don't write pleadings.

So in my mind it was it clear no one ever said you are not to draft pleadings. But they didn't have to, because it is clear.

Q. To you, Mr. Blazek?

A. Yes, sir to myself.

Q. All right.

A. And to a reasonable person, I think it would say.

Q. You think other reasonable people could reach different conclusions?

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- A. Yes.
- Q. Have you ever seen this document before, by the way?
- A. I don't think so. No, pretty sure I have not.
- Q. Look at the last page of that, please.
- A. Is that I.O.P. 42 Attachment C., or is that before the attachments again?
- Q. The very last page of the whole document.
- A. Attachment C.
- Q. That is right. If you could for yourself just to yourself review that first paragraph, please.
- A. Okay.
- Q. Is that description in the third sentence the reference to provide legal counsel, and then in parenthesis, advice consistent with what your understanding of your job at the penitentiary was or is?
- A. Absolutely. I would say advise slash research. But, yes, that is all consistent.
- Q. You don't understand that you have ethical, technical and ethical obligations to people that you don't have an attorney-client relationship with you, do you?
- A. No, of course not.
- Q. Okay. In all candor do you believe that you are in a position to represent an inmate in A. Basement facing execution in less than two weeks and file — in order to file

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necessary papers and obtain a stay of execution?

- A. Do I feel able to do that?
- Q. Do you think, do you think you have the time and do you believe that you are competent to do it?
- A. No on neither.
- Q. Okay.
- Do you have the financial resources necessary to travel in order to obtain stays or make other significant expenditures on behalf of an inmate in A. Basement?

- A. What sort of resources are you talking about?
- Q. If you had to pay 3 hundred 50 dollars for an airplane ticket to go to Abingdon to get a stay, were you in a position to do that?
- A. Technically.
- THE COURT: Let's not be examining —
- Mr. Zerkin: I withdraw that.
- THE COURT: Let's not examine the witnesses financial situation.
- Mr. Zerkin: Nothing further.
- THE COURT: Help the witness down. Unless I hear objection, the witness is excused.

(Witness down.)

THE COURT: Mr. Gorman, let me address a question to you. I hate to keep coming back to this court appointment. It is true that, I suspect, that the cost of the cost

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is reasonably diminimous, but they also run up to 3 thousand I heard from the evidence today. Is there an Attorney General's opinion that says that Circuit Judges are not authorized to appoint counsel so that costs can be made, or is it just a split among the Judges as to — because I imagine the Judges who do not do it do not do it because they don't think they are authorized to do it. Those that do, they think are, is that correct?

Mr. Gorman: I don't think that is the problem. I don't think there is a problem in payment.

The opposition from the Attorney General's Office comes from the position that I believe it says that a voluntary lawyer has already appeared as counsel of record and therefore, having the Court appoint that person as an attorney upon his motion in essence destroys the prerogative of the Circuit Court in picking who it wants to out of all the pool of attorneys out there to appear in the case.

I believe that is the basis of that kind of motion where somebody has already come in as counsel of record.

THE COURT: How about the inmate that goes to the Court and says will you appoint counsel for me? Does the Attorney General oppose it?

Mr. Gorman: No.

THE COURT: Do not?

Mr. Gorman: No.

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THE COURT: So these people could just simply file a petition.

Mr. Gorman: That is our position.

THE COURT: And you all would not oppose the Court appointing counsel to help a death row inmate?

Mr. Gorman: That is our position.

Mr. Landers: If that is —

THE COURT: Just a moment. Just a moment.

Are you sure now?

Mr. Gorman: If I understand what you are saying —

THE COURT: I will give you an express example.

Death Row Inmate A. files a petition in the Circuit Court of the City of Richmond habeas corpus pro se. And in there prays that he be permitted to file it in forma pauperis and that counsel be appointed.

A. Yes.

THE COURT: To handle the matter for him.

Mr. Gorman: That is correct.

THE COURT: I take it from what you just said that the Attorney General's Office does not oppose that appointment.

Mr. Gorman: That is correct.

THE COURT: Isn't that the end of the case?

Mr. Landers: I want to be sure, Your Honor, but if Your Honor doesn't want to hear argument on this now we can —

THE COURT: I don't want to hear any argument, but

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what I would want Mr. Gorman to do is to double check it, because, you know, we don't shoot partridges on the ground

around here. I want you to be sure. Don't — I will take the question back and I will ask you later.

Mr. Harris: The answer to the question is yes, the Attorney General's Office would not oppose counsel. That is something we intended to offer into evidence. As far as a matter of what the current policy has been regarding volunteer attorneys, one of the plaintiff's exhibits is a letter from Assistant Attorney General on that very issue. That gives an example of why he is objecting to voluntary counsel being appointed as counsel, and the Court ignored his objection.

THE COURT: Poor Miss Dean here, she has been running all over the country. All she had to do was get —

Mr. Landers: So that I can understand this colloquy, if I might, I wonder if you could direct a question to my colleagues.

THE COURT: Not in my presence.

Mr. Landers: Thank you, sir.

THE COURT: They may not want to answer you. Do that when I am not here. All right, call your next witness.

Mr. Sasser: Plaintiffs call Lloyd Snook.

TESTIMONY OF LLOYD SNOOK

July 10, 1986

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(Witness Sworn.)

Lloyd Snook testified as follows:

Direct Examination

By Mr. Sasser:

Q. Please state your full name.

A. John Lloyd Snook, III.

Q. Are you a lawyer, Mr. Snook?

A. Yes, I am.

Q. Where do you practice?

A. Charlottesville.

Q. How long have you practiced?

A. Since October of 1979.

Q. Do you have any experience in post conviction proceedings for death row inmates in Virginia?

A. Yes, I do.

Q. Have you represented death row inmates in post conviction proceedings in Virginia?

A. I have represented in fact six, and in name for a couple of weeks one.

Q. What courts have you represented them?

A. Well, various Circuit Courts around the state in the Virginia Supreme Court, both on direct appeal and on state habeas appeal in the Eastern District of Virginia, both in Norfolk and in Richmond, and in the Fourth Circuit and in the United States Supreme Court.

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Q. For these six or seven inmates have you ever moved to be appointed as counsel?

A. Yes, I have, in every one.

Q. Did the Commonwealth take a position in any of those, any of those motions?

A. I take it back. I have moved in six of the seven. And in each of the six appointment was opposed by the Attorney General's Office.

Q. Let me refer you to Exhibit 36 in the Witness Book.

A. All right.

Q. Did you move for appointment of counsel in Michael Morehouse Smith's case?

A. Yes.

Q. Where was that?

A. In the Circuit Court for the City of Williamsburg County of James City.

Q. What was the outcome of that motion?

A. That was denied.

Q. And is Exhibit 36 the order and letter denying your motion?

A. Yes, it is.

Q. Did you in the case of Willie Leroy Jones, did you and Mr. Clark move for appointment of counsel in Circuit Court?

A. Mr. Clark did, yes.

Q. What Circuit Court was that in?

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A. That is York County.

Q. Let me refer you to Exhibit 35.

A. Yes.

Q. Is that a letter, Exhibit 35 a letter from the Office of the Attorney General regarding Mr. Clark's motion?

A. Yes, it is.

Q. And what was their position?

A. Well, their position was basically that counsel was not needed, they were also particularly concerned that since I would be coming from Charlottesville that that was some problem. I should add, Mr. Clark was not willing to undertake the representation without my assistance.

Q. In the case of Morris Mason, how --

THE COURT: Wait a minute now.

If this is going to do you any good, you better let me read this exhibit.

All right.

A. I should add, I was not willing to assist Mr. Clark unless I was going to be appointed and get some costs, either Judge.

THE COURT: But if hindsight was as good as foresight, I guess you could have gotten authorization from your client to file a pro se petition and ask for appointment of counsel, and that would have relieved them because there wouldn't have been opposition.

• • •

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Q. Were you counsel briefly in the Earl Washington case?
A. I was local counsel. Actually I think I was local counsel for a couple of months, though in fact about the only thing I did was sign the petition to get it into court to get the stay of execution.

Q. Are you aware of the order denying counsel in that case?

A. Yes.

Q. Do you know whether the death row inmates motion that counsel be appointed was opposed by the Attorney General's Office?

A. I am not aware of my own knowledge.

Q. In the Morris Mason case where did you move for appointment of counsel?

A. We first moved for appointment of counsel in Circuit Court for Northampton County.

Q. What was the result of your motion?

A. That was denied.

Q. That was opposed by the Attorney General's Office?

A. Yes.

Q. Let me refer you to Exhibit 6.

THE COURT: 6 did you say?

Q. 6, Your Honor.

A. I think I need the other book.

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By Mr. Sasser:

Q. Have you moved for appointment as counsel in Federal Court?

A. Yes, I have.

Q. What date was that?

A. This one exhibit refers to Joe Giarratano, habeas petition. In fact, I have moved in all five cases in District Court. The practice in Norfolk seems to be to refuse to appoint counsel where Judge Warriner did appoint me in a case.

Q. Was your motion refused in Giarratano's Case?

A. Yes.

Q. Was it refused by any other Federal Court?

I mean any other cases?

A. It was refused in Smith Mason and Turner in the Eastern District of Virginia in Norfolk.

THE COURT: Well, now, read the last paragraph. The Magistrate, and this is a Magistrate letter, position apparently is precisely the same as the Attorney General of Virginia's position that there isn't any -- it is inappropriate to appoint counsel who has already appeared as counsel.

A. Yes, sir.

THE COURT: Isn't that exactly the same position?

A. As far as I can tell.

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THE COURT: Do you think that is unreasonable?

A. Judge, the problem in Joe's case is a good example of this, that we had in this case was that we went through the State habeas procedure, we had been appointed by the Circuit Court. In fact, we first got into it in the Virginia Supreme Court where we took the place of and were substituted as counsel, presumably appointed counsel for Albert L. Berry. We then filed a habeas petition in Circuit Court and were appointed to represent Joe Giarratano at that point and were appointed also for the appeal, received some sums of money, not a whole lot, but some. Then at that point Mr. Giarratano refused to authorize us to file certain petitions, so the next step would have been to move on into federal habeas.

At that point the Attorney General's Office was saying you file something in 30 days or we are going to set an execution date. And feeling at that point that our client's interests would be

sufficiently compromised by having an execution date, we said, okay we will file something. I suppose we could have followed the procedure of filing pro se. In fact, at one point Joe was proceeding pro se. But, the original filing was not pro se.

We could have filed it that way. And then left Joe to his own devices or whatever procedures the Court may have had.

It was our feeling that it was a continuation of the

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ethical obligation that we had undertaken in our earlier appointment to continue with that, particularly in light of the dire consequences that would be — that would come to pass if we were not to do so.

THE COURT: Well, I respect that.

I admire you for it, but at the same time I can appreciate the fact that a Judge or an Attorney General or Magistrate, as in this case, is not willing to permit petitioners to choose their court appointed counsel. I mean, simply it would be impossible.

A. Well, Judge, if I might, this particular letter was in response to a rather unusual situation that had come up.

We had in July of 1983, I don't say call off the case, call off the appeals, I want to drop it, that is when we were before the Magistrate, we went through about 5 months where Joe technically had fired us. We then picked the case back up when he said, okay, I will continue with my appeals pro se, but I want you as advisor, and we are willing to proceed on that basis. And there was sort of a question between us as to who was controlling what. It became apparent to us in late 1984 early 1985, the exact date I don't remember, that we needed to file an amended petition raising new issues relating to Joe's psychiatric condition. To that end I filed a motion that said, Judge, please appoint us as counsel, and the primary reason I wanted appointment as counsel at that

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point was that I didn't have the money to get a psychiatrist. And it was really to get the psychiatric help and the psychiatric expert

opinions that we wanted appointment.

That presumably would have been the case whether I was appointed counsel or anyone else.

I was more interested in getting the help for my client. And that was really the issue that was raised here.

Since that time Arnold and Porter from Washington has taken over the case. They have the resources to underwrite those expenses themselves. And they have gotten a psychologist to do that.

THE COURT: Mr. Snook, I understand. And maybe I am playing Devil's advocate, but you see how the door would be open if you simply let petitioners chose their own counsel to be appointed by the Court. And that is really all the Magistrate is saying. We can't let petitioners, if we do it for one, you have to do it for all.

Now, fairness, I must say, the nature of these type of cases with death row inmates, it may make a difference, so I am of the initial view, the Attorney General's Office may convince me otherwise, that it takes a special part of the Bar to handle these type of cases.

A. I would agree with that, Judge.

THE COURT: Of course. I would not feel comfortable, to be perfectly frank with you, for example everybody that

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comes into this Bar that gets on the list for appointment, when I get a case of this nature, instead of the clerk just going down the list, or even a serious, very serious federal cases, the clerk will come to me to select counsel. It is not fair for example to give a person charged with murder an attorney who has been at the Bar two months and has never tried a criminal case.

But the whole principle here, and as I understand the Attorney General's position the whole principle is they are not willing to, nor is this Court willing, to permit petitioners to select their own counsel. That is all it is. I have a feeling that the next recess we take, and I already asked the questions of Mr. Gorman, and we may be through here, but go.

Q. Has any court rejected the Attorney General's position?

A. Yes.
 Q. What court was that?
 A. Well, one example was Judge Holloway. In Giarratano's case in Circuit Court for the City of Norfolk they rejected the position and went ahead and appointed because it was regarded as continuation of prior representation. In the Willie Turner case the Circuit Court for Southampton County again regarded it as continuation of earlier representation of him. In the Virginia Supreme Court on direct appeal,

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said, okay, we will appoint you in that case. I believe those are the only cases.

Q. All right. No further questions.
 THE COURT: Any cross? Mr. Harris?
 Mr. Harris: Briefly, Your Honor.

Cross-Examination

By Mr. Harris:

Q. As is stated in Judge Holloway's letter, he indicates that Mr. Clark approached him before the petition was filed and indicated he would be willing to represent the prisoner if he could be appointed, is that the understanding in that letter?

A. That was which exhibit again? 36? 35?

THE COURT: 36.

A. 36?

No, it wasn't 36.

THE COURT: Well, the only two that were mentioned is 36 and 35.

A. 35, okay.

Q. Yes.

A. That is Mr. Conklin's letter.

Q. I am sorry, I am looking at 34.

A. Okay.

That certainly is what it says. I have no first hand knowledge of having heard that.

* * *

TESTIMONY OF JOSEPH GIARRATANO

July 10, 1986

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* * *

(Witness Sworn.)

Joseph Giarratano testified as follows:

Direct Examination

By Ms Geer:

Q. Mr. Giarratano, --

THE COURT: If you want water, let the Marshal know.

Q. Mr. Giarratano, what is your full name?

A. Joseph Michael Giarratano.

Q. Are you currently on death row at Mecklenburg Correctional Center?

A. Yes, I am.

Q. How long have you been on death row?

A. Approximately 7 years.

Q. How old are you?

A. 29.

Q. How far did you get in school?

A. Completed the 9th grade.

Q. When you arrived on death row how did the men on death row obtain lawyers for post conviction proceedings?

THE COURT: Pull the mike down a little bit.

A. Well, I obtained counsel in East Basement.

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Q. Could you explain what you mean by that?

A. I was in the death house. Mr. Snook and Richard Bandy contacted me.

Q. Were they retained?

A. No, I take it back, Richard Bandy and Dr. Showalter.

Q. Did there come a time, Mr. Giarratano, when you became aware there was a problem with respect to obtaining attorneys to represent death row inmates in post conviction proceedings?

A. Yes, there was. There were -- I first became aware of it with Garry Peterson, who was another inmate on the row.

He showed me a letter from his attorney saying that the

attorney quit after the automatic review at the Virginia Supreme Court. And he asked me what I should do, what he should do.

Q. What did you tell Mr. Peterson?

A. Well, I directed him to Marie Deans, but he was not allowed to call her.

Q. With a death row, why was he unable to call Marie Deans?

A. At that time there were some conflict of whether or not inmates could call paralegals.

Q. Did you do anything to assist Mr. Peterson?

A. Yes, I did.

I wrote, broke the rules and regulations of the

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institution and called Marie Deans.

Q. Was Marie Deans able to find him an attorney?

A. Yes, she was.

Q. Are there any other death row inmates you have attempted to help obtain lawyers for post conviction proceedings?

A. Yes, I believe the next was Manuel Quintanna.

Q. What did you do to help Mr. Quintanna?

A. I contacted the A.C.L.U. of Virginia, the Court appointed attorneys of Mecklenburg, Marie Deans, various other people I know on the outside.

Q. Who do you mean when you say court-appointed attorneys at Mecklenburg?

A. Harry Montgomery and Falcon Hodges.

Q. What did you tell Mr. Montgomery and Mr. Hodges?

A. That Manuel didn't have an attorney to handle the cert. petition or habeas. And he was a Spanish speaking inmate who didn't speak English.

Q. Did either Mr. Montgomery or Mr. Hodges help Mr. Quintanna?

A. They said they couldn't help him, they couldn't speak Spanish.

Q. How do you know they didn't help him?

A. I was in the unit with Manuel.

Q. Why did you personally try to locate an attorney for

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Mr. Quintanna?

A. Well, I believed that he had a right to appeal his case, and he was unable to help himself. He didn't understand the system. And I spoke a little bit of Spanish, so I was able to communicate.

Q. Did he ultimately get a lawyer?

A. Yes, Marie Deans obtained an attorney for him. He soon died after that.

Q. Do you still assist death row inmates in getting lawyers for post conviction proceedings?

A. I wouldn't say assist, other than contact Marie. I work with her.

Q. What do you mean when you say you contact Marie and work with her?

A. I will call her on the phone when an inmate comes to see me and tells me his lawyer quit, or if I find out about it either through the papers or that it has been affirmed. Will call her to make her aware of the situation. Usually she knows already. She does whatever she does to get attorneys.

Q. Mr. Giarratano, you brought this lawsuit yourself pro se last summer?

A. Yes, I did.

Q. Can you tell us why you brought this lawsuit?

A. There were several men on the row at the time who

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didn't have attorneys. I contacted Miss Deans, who was making the attempts to find those attorneys. Cert. deadlines were coming up and weren't having any luck.

Q. Are you aware of any instance where a death row inmate did not have an attorney for a particular post conviction proceeding?

A. Poyner.

Q. How do you know that?

A. I filed the cert. petitions.

Q. Was there more than one petition?

A. Yes there were. There were two petitions. There were basically -- there were three petitions, but the first petition was out of time. And somehow or another, the Supreme Court said that they would accept the first petition if I filed the second two petitions on time.

Q. Why did you prepare petitions?

A. We couldn't find attorneys to handle it.

Q. Why didn't you help Mr. Poyner prepare it himself?

A. Mr. Poyner didn't even know where he was at.

Q. What do you mean by that?

A. He doesn't understand what is happening or that he is going to be killed.

Q. How long did you have before the petition had to be filed?

A. I would say just about a week.

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Q. Did you ask anyone to help you with the petition?

A. I contacted Harry Montgomery.

Q. Is he one of the institutional attorneys?

A. Yes, he is.

Q. What did you ask him to do?

A. I advised Mr. Montgomery what was happening with Mr. Poyner's case. I made him aware that cert. petition had to be filed. Because Marie couldn't find attorneys. Harry had made it clear to me since he has been appointed that he couldn't represent anybody.

I asked him for his assistance with the service because I never filed a cert. He told me he didn't know anything about certs. and it really wasn't much he could do except get copies of case law.

Q. When he said there wasn't much he could do for you, did he know Mr. Poyner did not have an attorney?

A. Yes, he did. I told him, and I told him on several other occasions of inmates that didn't have attorneys.

Q. Did he know that the petition absolutely had to be filed in a week?

A. Yes.

Q. Did he ultimately provide any assistance at all on those cert. petitions?

A. No, he did not.

Q. Did Mr. Poyner file those petitions, petitions pro se?

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A. I drafted the pleadings, I put a line with his name printed under it, pro se, and then I put a paragraph underneath his name explaining to the Supreme Court that I drafted the pleadings, not Poyner, and why, with a cover letter to the clerk.

Q. What was the result of those petitions for writ of certiorari?

A. They were denied.

Q. Do you feel that you did a good job with Mr. Poyner's petitions?

A. I don't think so.

Q. Why not?

A. Well, I couldn't -- I never spoken to his trial attorneys, I had a bear record to work with. I can't pick an issue out of a transcript without Marie's help. Once I am given an issue, I can research it.

Q. Have you had to prepare any other papers for death row inmates?

A. Yes, I have. Extensions of time for writs of certiorari.

Q. For which inmates?

A. Well, Sabasti, Poyner, Richard Boggs, Johnny Watkins, Albert Clossa, I can't recall if I did one for Earl Washington or not.

Q. Why did you prepare those motions for extensions of

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time?

A. From my research I understand that the Supreme Court allows 60 days for death sentence individual to file a cert. petition, and only for good cause shown will they grant an extension. The 60 days was running out, Marie had not gotten the attorney, so I bought more time to help retain them.

Q. You mentioned that you filed a motion for Mr. Closa. Why didn't you have Mr. Closa file his own motion pro se?

A. Mr. Closa was in a strip cell on suicide watch. There was no way he could help himself. He was highly sedated with hypotrophic drugs.

Q. How do you know that?

A. I was in the unit with him.

Q. Is the strip cell in the unit?

THE COURT: It is a regular cell, they remove all bed sheets, clothing, just a bare mattress.

Q. During the time that Mr. Closa did not have an attorney, did you mention this fact to Mr. Montgomery?

A. Yes, I did.

Q. Did Mr. Montgomery ever assist Mr. Closa during the period he was without an attorney?

A. Not for the period that I was in the unit with Mr. Closa.

Q. Why didn't you have Mr. Boggs and Mr. Watkins file their own motions for extension of time?

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A. Both Mr. Watkins and Boggs tried.

I went over to the Law Library to assist them. I gave them what law books I had. They gave them back to me. They didn't understand it.

Q. Did you ever inform the prison administration that Mr. Watkins and Mr. Boggs did not have lawyers to represent them in post conviction proceedings and needed help?

A. Yes, I did through the inmate grievance procedure and numerous letters.

Q. Mr. Giarratano, would you please look at Exhibit Number 25 in the Witness Exhibit Book?

A. You said 25?

Q. 25. Have you seen Exhibit 25 before?

A. Yes, I have. It is inmate grievance that I filed.

Q. When did you file this grievance?

A. The date shows 10/23/85.

Q. Could you please turn to Page 2 of the grievance and read aloud the last paragraph.

A. If all this is wrong, notify counsel appointed and let them know that inmates Boggs and Watkins have cert. petitions due and that their representation is required. The deadline is 11/5/85.

Q. Who were you referring to when you wrote Counsel Paren appointed close Paren?

A. Harry Montgomery and Falcon Hodges.

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Q. Am I correct grievance contained more than one request?

A. Yes, it did.

Q. Did you receive a response to the final request, the last paragraph of your grievance?

A. No, it was ignored.

Q. Did you tell either of the institutional attorneys that Mr. Watkins did not have an attorney?

A. I told Harry Montgomery on several times, most recently this past weekend, Richard Boggs still has no attorney.

Q. We were discussing Mr. Watkins. Did you tell them about Mr. Watkins?

A. Yes, I have on several occasions.

Q. What about Mr. Boggs?

A. Yes, on several occasions.

Q. And most recent time being?

A. This past weekend.

Q. Could you tell us what happened this past weekend?

A. Harry Montgomery came to the unit. I was in my cell. Asked the officer to call me out. I came out. He asked me what was happening in regards to this case.

I told him we were going to trial. He asked if Richard Boggs had an attorney yet, and I told him no.

Q. Have you filed, submitted any other papers to the

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Court on behalf of a death row inmate?

A. Yes. In regards to this suit I have.

Q. Would you please explain?

A. Earl Washington received an execution date shortly after the suit was filed. And I contacted Harry Montgomery and Falcon Hodges about the situation. They couldn't help us. Once the execution date was set he, Earl was transferred to the penitentiary. I felt that Earl was a plaintiff in this suit. I approached Judge Merhige.

Q. Could you please turn to Exhibit 21. Is that the letter that you are referring to?

A. Yes, it is.

Q. Now, did you just testify as to whether you had told Mr. Montgomery of Mr. Washington's status?

A. Yes.

I told Mr. Montgomery. In fact, he was aware of why this, I filed this whole petition, the original complaint.

Q. Did Mr. Montgomery help Mr. Washington in anyway during the time that he did not have an attorney?

A. Not while I was in --

Q. During what period of time was Mr. Washington in your unit?

A. Up until he went to the State Penitentiary.

Q. Beginning when?

A. I would say from the time that he was denied Virginia

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Supreme Court.

Q. How often does Mr. Montgomery visit death row?

A. Since the filing of this lawsuit, probably every weekend.

Q. Has he always visited every weekend?

A. No, He hasn't.

Q. When did his practice change?

A. Soon after this lawsuit was filed.

Q. Prior to the filing of this lawsuit how often did he visit death row?

A. We didn't see him that often. He would come, I believe when an inmate would request it. I had requested to see him on occasions.

THE COURT: Well, there aren't any reasons for one to come unless requested, is there, sir?

A. No, that is true. He would come when requested, but once this lawsuit was filed it didn't matter, he would come.

THE COURT: He began coming without a request.

A. Yes, he would come every week on his own.

Q. What does Mr. Montgomery do now when he visits your unit?

A. Basically he comes to my unit and asks me what the status of the various cases are. Who has attorneys, who does not.

He brings a little computer print out sheet with him,

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and I answer the questions if I know the answers, and he jots it down. He calls it his monitor book.

Q. Have you ever asked Mr. Montgomery to help you with research?

A. Yes, sir.

Q. Has he?

A. Harry Montgomery will get me cases.

Q. When you say that, does he go out or are these cases that you specifically request?

A. Yes, I have to give him the specific cites. I have always given him the specific cites of cases I want.

Q. Have you ever asked, has he ever refused to do general research for you?

A. Harry makes it clear to me and the other inmates he will get us copies of case law.

Q. Well, Mr. Giarratano, was there a period when you were in isolation?

A. Yes, there was. I was in the isolation unit. I had a court deadline. I requested to go to the Law Library. They told me since the administration told me since I was in isolation I couldn't go to the Law Library, but I could use the services of the Court appointed attorneys.

Harry Montgomery came to the isolation unit, asked me what I needed. I told him. He said there was nothing he could do for me. And I asked him if he would tell Mr.

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Killeen, who was Operations Officer, and he said he would.

Q. Did you ever get to the Law Library or receive law books?

A. Not while I was in isolation, no.

Q. Why did you need to do research?

A. At that time it was pertaining to my capital case. I believe I had just been denied on. I think Magistrate Turner had denied me.

A. I wanted to switch counsel. Lloyd Snook who, there was a lot going on with his other cases.

Q. Mr. Giarratano, who is the second court appointed attorney at Mecklenburg?

A. Falcon Hodges.

Q. Have you ever asked Mr. Hodges to help you with research?

A. Yes, I have.

I believe it was approximately five years ago. Maybe a little sooner than that. I had asked Mr. Hodges to get me a copy of a case, the Bounds v. Smith case. He said he would take care of it. A week later he came back and brought me the first page and said that is all I needed.

Q. Mr. Giarratano, you have a habeas corpus proceeding pending, correct?

A. Pending?

Q. Excuse me. What is the status of your habeas corpus

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case?

A. Denied.

Q. At what level?

A. Federal.

Q. Do you think that you are capable of proceeding pro se in post conviction proceedings?

A. No.

THE COURT: Would you repeat that question? I didn't catch it.

I missed part of it.

Q. Mr. Giarratano, are you capable in your opinion of proceeding pro se in post conviction proceedings?

A. No, I am not.

Q. Would you tell us why?

A. Could I use my own case as an example?

Q. Yes.

A. Well, I am not out of state. The facts of my case are.

THE COURT: Move the mike towards you, too. And sit back if you will.

A. The facts of my case are quite complicated.

All of the -- I couldn't do the factual investigation that was needed because the witnesses were in Florida. I am in the penitentiary in the State of Virginia.

Q. -- Um hum.

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What about the legal research?

A. Well, legal research I can go to the Law Library at Mecklenburg. I am locked in a little cage and they have two clerks and an officer clerk and inmate clerk. When I go over there I spend most of my time trying to teach them, so that they are really no help to me.

THE COURT: How much of a library is there? All of the federal reports there?

A. I would say back to probably 1969.

THE COURT: U.S. Code there?

A. The U.S. Code is there.

A. There is federal supplement, federal reports, the U.S. Supreme Court cases, I think federal digest is there now. Virginia reports.

THE COURT: Pretty good library then.

A. Yes, it is a decent law library.

Q. Mr. Giarratano, do you have a copy of the transcript in your case?

A. I have a joint appendix, I don't have it any more.

Q. Are you able to use the transcript?

A. If you mean can I read it and understand it, as far as

drawing out legal issues if there is a glaring violation of a Miranda violation I could pick that up, but beyond that, no.

A clear cut issue I couldn't tell you one from another.

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Q. Could you challenge your lawyer's effectiveness at trial?

A. I don't know what makes a lawyer effective at trial or makes an ineffective.

Q. Mr. Giarratano, are there currently death row inmates who don't know how, don't know enough to ask for a lawyer? Strike that.

Are there currently inmates there who don't know enough to for the assistance of institutional attorneys?

Mr. Gorman: Objection.

THE COURT: Objection sustained. That is speculative.

Any cross?

Cross-Examination

By Mr. Gorman:

Q. Mr. Giarratano, picking up on one of the last points that you raised in your testimony this afternoon dealt with the your capability of handling your case pro se. And you mentioned as one of the factors, I think one of two, that you would have trouble conducting legal research?

A. Correct.

Q. You have been engaged in quite a number of 1983 suits, have you not?

A. You mean 1983 actions that I filed?

Q. Yes, sir.

A. Two, three at the most.

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Q. I believe, if memory serves me correctly, you filed one in court with this Judge right here, and I was opposing counsel in that case, isn't that right?

A. Yes. And I won.

Q. You won that case, didn't you.
Out researched me, didn't you.

A. No comment.

THE COURT: Boy, you are different, Mr. Gorman. Old lawyers only talk about the ones they won.

Q. Let's go back to the very beginning now, Mr. Giarratano. I believe you testified that you have a 9th grade education?

A. Yes.

Q. Is it not true that you got your G.E.D. in Florida?

A. Yes, that is correct.

Q. All right. You mentioned in I think several places in your testimony that you contacted Mr. Montgomery regarding various inmates who did not have counsel. Did you ever go to those inmates and tell them to contact Mr. Montgomery?

A. Yes, I have. Inmates in the you unit with me. I can't travel all over the building.

To the various inmates.

Q. Did you advise them to go to Mr. Montgomery and ask him to grant petition on their behalf?

A. Harry made it clear to me he doesn't draft petitions.

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Q. I didn't ask you that. Did you advise them to go to Montgomery and ask him to draft a petition on their behalf?

A. No. I sent inmates to Harry Montgomery.

Q. All right.

Now, during all of this time that you say you were talking to Mr. Montgomery about helping these other inmates, was Marie Deans working on behalf of these inmates to locate counsel?

A. Yes, to the best of my knowledge she was.

Q. And would it also be true to say that during this time you yourself were represented by counsel.

When you were asking?

A. Yes, at different times.

Q. Do you know if Mrs. Deans asked Mr. Montgomery to file or rather prepare a pleading for any inmate?

A. I don't think I -- not to my recollection, I can't remember.

Q. Did he ever ask you to get Mr. Montgomery to help prepare any pleading?

A. The question confuses me because I have been at Mecklenburg for 7 years with court appointed attorneys, and they tell me they can't draft pleadings.

Q. Would you dispute the fact Mr. Montgomery filed a motion for extensions of time in death row cases?

A. I believe Harry has told me that he, if I remember

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right, might have been the Stockton case.

Q. All right. When did he tell you that?

A. Probably whenever it was he filed it. I seem to recall him doing something on the Stockton case.

Q. So at least you knew he prepared those kinds of motions.

A. I don't know -- I can't say it was a motion, I don't know what he did.

Q. Do you have the N.A.A.C.P. Legal Defense Fund manual?

A. Yes.

Q. Do you have a manual prepared by Dennis Bausky from the Southern Poverty Law Center?

A. I have a manual, prepared capital case litigation that is really a spin off of the old manual because they rely heavily on that. It basically outlines the steps in the appeals process and gives sample pleadings.

Q. Including petitions for certiorari?

A. Yes, I believe there is a sample pleading of a cert. petition there.

Q. All right.

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Q. At Mecklenburg, are inmates allowed to come out of their cells during the day?

A. Yes. Between 7:00 in the morning and 9:00 in the evening in the Day Room Area.

Q. During that time do they converse with each other?

A. Yes, the individuals in the same pod.

Q. Do they talk about legal cases?

A. Some do.

Q. Some do. Not everybody?

A. No.

Q. Would you say then that the inmates are aware or could be aware of the fact that there are post conviction remedies available to them through their conversations with other inmates?

A. Most guys know there is an appeal somewhere.

Q. How about newspapers? Do you get newspapers down there?

A. Yes, if you get the Times Dispatch.

Q. Does the Times Dispatch routinely report instances of when inmates have their conviction or sentences overturned on death row?

A. Yes. There was one the other day.

Q. That is all I have.

THE COURT: Any redirect?

Ms. Geer: Yes, Your Honor.

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Redirect Examination.

By Ms. Geer:

Q. Mr. Giarratano, how many men on death row do you know?

A. I couldn't give you an exact, I would say 29.

Q. Do you know them well?

A. With the exception of one or two of the newer guys, yes, I know the majority of them well.

Q. Have you talked to all of these men?

A. Yes. I have been in the unit. They switch us around a lot. I have been in the unit with all of them at one point or another.

Q. Have you discussed legal matters with them?

A. I have had inmates bring me letters from their attorneys or asking me what this means, explain this to me, or just basic stuff like that.

Q. Have you discussed your criminal cases with them?

A. My criminal case?

Q. Their criminal cases.

A. I answer their questions if they have any.

Q. Have you seen things that these men have written?

A. Yes. The men have showed me letters from families, from lawyers. They have asked me to write letters for them. Some of them don't write very well.

Q. Why have they asked you to write letters for them?

A. They can't write them themselves.

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Q. I believe Mr. Gorman just asked you whether you were aware if these men understand post conviction proceedings. Is that correct?

A. I would say the majority of the men on the row don't.

Q. Now, from the same conversations that Mr. Gorman asked you about and that you have just testified about, do you have an opinion whether these men know enough to request assistance of an institutional attorney?

Mr. Gorman: I am sorry.

THE COURT: Objection sustained.

It is well known around there that there are institutional attorneys, isn't it?

A. Your Honor, they just passed out I think like on June 5 a new orientation manual, and they passed it out in each death row unit. The statement is there are court appointed attorneys. I have made basically all of the inmates aware of it.

THE COURT: They all know that they are there.

A. Sure.

THE COURT: I suppose the word has gotten around they don't draft petitions?

A. And they don't represent.

THE COURT: All right.

Ms. Geer: No further questions.

THE COURT: Any recross?

TESTIMONY OF ROBERT N. BALDWIN

July 11, 1986

[Page 289]

(Witness Sworn)

Robert N. Baldwin testified as follows:

Direct Examination

* * *

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Q. What does that represent?

A. This column represents the expenditures for the Fiscal Year that ran from July 1 of 1984 through June 30 of 1985.

Q. All right, sir.

Now, for our purposes today there are two items I want you to speak of particularly. One is the item which is the second item on the first page of that exhibit called habeas corpus. Over on the far right-hand column the Figure 43 thousand and some odd change, what does that represent?

A. The Appropriation Act in Virginia authorizes the payment for counsel appointed to defend people who bring petitions for habeas corpus, either original petitions in the Supreme Court of Virginia or petitions in the Circuit Courts in our State, and this 43 thousand dollar figure indicates the monies that we have paid to counsel to represent indigent defendants in those cases.

THE COURT: You misspoke. I want to be sure the record is straight.

You said to defend. You didn't mean that. You mean to prosecute a habeas corpus.

A. No. This is for defense.

THE COURT: Defense.

A. Yes, sir.

THE COURT: That the Attorney General would ordinarily handle?

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A. These are for court appointed counsel for these cases to defend -- well, okay, I understand what you are saying. I am

sorry, yes, okay.

THE COURT: You are right and I am wrong. Maybe they are the petitioner.

A. That is correct, I am sorry. I apologize.

THE COURT: All right.

So you expended that year I take it 43 thousand 366 point 71 for what we would call court appointed counsel to represent petitioners in state habeas corpus?

A. That is correct, yes, sir.

Q. These are cases in which the circuit court appointed an attorney to represent these individuals?

A. That is correct.

Q. Second item I want to draw your attention to, Mr. Baldwin, I believe on the second page, the third up from the bottom there is an item, statutory reference to 53 point 1-40, and the description of that statutory source is court appointed attorneys for indigent convicts. Can you explain what that means?

A. 53 point 1 dash 40 of the code authorized circuit court judges to appoint counsel to assist indigent convicts, people who are incarcerated in the penitentiaries to assist them with legal responsibilities. This is the code section that authorizes that payment, and these are the funds that we

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expended for those counsel so appointed.

Q. So that for fiscal year of '85 you expended 191 thousand 602 dollars 86 cents?

A. That is correct.

THE COURT: Is that as you understand it, Mr. Baldwin, the program whereby the circuit judges appoint one or two lawyers for each of the places of incarceration?

A. Yes, sir.

Q. I ask you to refer to Defendants' Exhibit 2, Mr. Baldwin, which is the more current print out apparently from the same type of accounting.

Now, that is dated May of '86. Does that mean that that includes 11 months out of the 12?

A. Yes, it does.

Q. Fiscal year '86?

A. Correct. We do not have the figures for the month of June or the year end figures at this time, but this is through the first 11 months or the fiscal year that ended June 30.

Q. So as far as comparing the two years, the comparison would be inaccurate to the extent of one month not showing up?

A. That is correct.

Q. All right.

Can you just read into the record the two
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corresponding figures for the 11 month, for those other --

A. The habeas corpus figure is 32 thousand 178 dollars. And the Court appointed attorneys for convicts its 233 thousand 737 dollars.

Q. That second figure appears on the second page, is that correct?

A. The bottom of the second page.

A. All right, sir.

Mr. Baldwin, to your knowledge, have you ever, has your office ever rejected any of the payments certified under those sections?

A. Not to my knowledge.

Q. All right. That is all I have, Your Honor.

THE COURT: Any cross-examination?

MS GEER: Yes, Your Honor.

Cross-Examination

By Ms Geer:

Q. Mr. Baldwin, on Defendants' Exhibit 2, item 2 labeled habeas corpus, that includes all inmate petitioners in the State of Virginia, doesn't it?

A. To my knowledge, yes.

Q. Are you able to break out from that figure what was paid for representation of death row inmates in habeas corpus?

A. No, we are not.

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Q. Could the witness be given plaintiff's volume two of plaintiff's exhibits?

Would you turn to Exhibit 32. And the second page of Exhibit 32. I refer you top paragraph 24 subsection 3, is that the reference in the appropriations act.

A. That is correct.

Q. Mr. Baldwin, you testified that you are unaware of any, -- excuse me. Strike that.

No further questions.

THE COURT: Do you know how these payments come about, Mr. Baldwin? Is it by statutory authority? Or the inherent authority of the court? Or is it just simply put in the budget?

A. The habeas payments? It is simply put in the budget. To my knowledge there are no specific statutory references, this is the one of the few that have no specific statutory reference, but instead has been just a practice that it be a line item in the budget in the appropriations act.

THE COURT: Would it be fair to assume then that as far as you know, the state authorities acquiesces in the Court's inherent power to appoint counsel and to recover these funds.

A. They always have.

THE COURT: I am getting more confused every minute as to why we are here. We will find out.

* * *

TESTIMONY OF ROBERT G. WOODSON, JR.

July 11, 1986

[Page 296]

(Witness Sworn)

Robert G. Woodson testified as follows:

Direct Examination

* * *

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Q. All right. Is your appointment pursuant to a statute?

A. Yes, sir.

Q. What is that statute?

A. 53 point 1 dash 40.

Q. When were you appointed to that position?

A. I was appointed to the Powhatan Correctional Center February 2 of 1977. I am also appointed to the Buckingham Correctional Center, and appointed to that institution January 7 of 1983.

Q. All right. But with regard to your appointment at Powhatan Correctional Center, are there other court appointed attorneys functioning there now?

A. Yes, sir.

Q. How many?

A. Two others.

Q. Can you tell us who they are?

A. Richard Blanton and James Baber.

Q. What are your duties pursuant to your appointment under 53 point 1 dash 40?

A. I can go through and itemize the things that we do for the inmates. The statute says we are to assist and counsel. Would you like me to go through and --

Q. Yes, please.

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A. The way the Powhatan Correctional Center works is that the inmates write directly to the attorneys. Our names are posted on bulletin boards at the institution with the telephone numbers and addresses. We get letters from the inmates when they need to see us. We get telephone calls and do accept collect telephone calls.

We also are sometimes advised by the guards when we are at the institution that inmates need to see us, and also other inmates tell us that other inmates need to see us. I will go to see the inmate approximately seven to ten days after I get a request.

When I meet the inmate, I tell him what I can do for him.

I try to find out what his problem is and see if it is in the area that I can cover. We advise them we can do 1983 civil rights actions, we can --

THE COURT: When you say you can, do you mean you can prepare the complaint?

A. Yes, sir, Your Honor.

We also, if there is some condition at the institution such as a diet problem, inmates not getting proper medical attention, we talk to the warden or we write to the warden.

If it is a matter involving a tort claim, we advise them of the tort claims act. We will assist him in preparing the claim to be presented to the Attorney General's office.

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We provide him with a copy of the tort claims act so that he will know the statutory provisions, the time limits.

We will draft 1983 civil rights actions. We will draft proceedings to be filed in state court if it is a matter that is not proper for federal jurisdiction.

THE COURT: Such as habeas.

A. Yes, sir. We do, yes, sir. We will on a lot of cases the inmates will not have the transcript, or many in many cases the inmate will request to see us while his case is still appealed to the Supreme Court of Virginia or to the Virginia Court of Appeals.

I try to go through and tell him what the process is we have to wait until the Court of Appeals rules on the appeal, and then he has right to appeal to the Supreme Court of Virginia. At that time we will write to the attorney to request a transcript or to the Court if the attorney has returned the transcript. I get the transcript, read it, review it see what we can find in it and go over it with the inmate.

We also, I have a letter that I write to each inmate when

he has requested, a question about his conviction. We have a letter that sets forth basic grounds he can raise if it is a guilty plea, basic grounds he can raise if the plea was not guilty.

We have to go through what happened to him before

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trial. The warrant, the indictment, when the attorney met with him, in his opinion did the attorney spend enough time with him, did he ever go over the elements of the offense, did he know how much time got, did he know he could have a right to jury trial and testify, and have the right to witnesses. Did he feel the arrest was unconstitutional, and did the attorney look into -- did the attorney talk to the witnesses, did the attorney refuse to talk to the witnesses, and what the witnesses would have said that was important in the case.

Was there a problem with the jury? Did he have any objections to the members of the jury, the make up of the jury? Did the attorney make any objection? Was there a motion to suppress the evidence. Was there a motion to suppress a confession?

We try to go through those things to see if he did receive a fair trial.

Did the attorney spend enough time with him? Did he go through these things with the inmate up to the time of the trial. If we find any of these things present, we will include that in the habeas corpus petition.

We also include things in the transcript we feel the attorney should have objected to that he didn't object to.

There are sometimes grounds that it appears that attorneys don't raise on appeal that when there were

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objections made at trial we will go through and list these things, and when we go through the sentencing hearing. And then we will go through and prepare the transcript, I mean the habeas corpus and file the habeas corpus for the inmate.

Q. Does this mean that you appear as counsel of record in the case? How do you do this?

A. No, sir. I will prepare the habeas corpus, and maybe I shouldn't say we file. I prepare a habeas corpus, take it to the institution, read over it with the inmate, have him sign it, and then he mails it to the court or I will mail it to the court.

Q. In preparing these documents, habeas corpus petitions and the like, do you have occasion to conduct any factual inquiry?

A. The only factual inquires I do, I read the transcript, I get copies of all of the motions from the court, the jury instructions, the warrant, the indictment, on occasion I have prepared affidavits for other persons to sign or trying to establish ineffective assistance of counsel for inmates.

Q. Do you contact the attorney who handled the case?

A. I don't make a practice to do that. I have on occasion talked to the attorney. Many occasions the inmates say there is no need to talk to him because there will be a conflict between what he says and what the inmates says, so we try present the inmate's side of the store to the Court.

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Q. Do you have occasion as a case might progress through the courts to prepare legal memoranda or other notices?

A. Yes, sir.

Q. Notes, rather?

A. We will do the habeas corpus. Then when the inmate gets the answer from the Attorney General's office, the motion to dismiss, we will prepare a rebuttal. We will help him prepare the memorandum if that is required. And then when the matter gets to the federal court, we have on some occasions prepared a brief.

Q. Now, you used the term we. To whom are you referring?

A. The attorney at Powhatan Correctional Center. We make it a practice to do that.

Q. All right. Do you know if any death row inmates are housed at Powhatan Correctional Center?

A. I understand two death row inmates are housed at center. I think another was Mr. Joe Pain, but I think he was transferred to Mecklenburg.

Q. All right. Have you ever gone to see any of those inmates on death row at Powhatan?

A. I have seen Joe Pain.

Q. You have seen Joe Pain?

A. Yes, sir, before he was sentenced by the Court, the jury had found him guilty. The death sentence was given and Mr. Blanton and I talked to him before the sentencing given

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by the Judge.

Q. Did Mr. Pain request you, or has any death row inmate at Powhatan requested you to prepare any documents or other legal materials for him?

A. No, sir.

Q. In your dealings with the inmates at Powhatan Correctional Center, do you work under the supervision of any corrections department personnel?

A. No, sir.

Q. Do you have any difficulty in going to see these inmates?

A. No, sir.

Q. Who appointed you, what judge was it?

A. It was Judge Pollard. He was the Chief Judge, I believe in Powhatan in 1976 at the time. Judge Warren is the Judge now, but Judge Pollard signed the order.

Q. Has Judge Warren ever indicated to you there is a limitation on the number of court appointed attorneys for Powhatan Correctional Center?

A. No, sir.

Q. How are you paid?

A. By voucher, prepare a statement as to the expenses we have, the hours we have in each month and submit it to the circuit court clerk.

Q. With regard to your appointment at Buckingham, has any

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inmate by the name of Reed requested you to prepare any

documents for him or on his behalf?

A. No, sir.

Mr. Reed has requested that I get case law for him. And we have gotten that case law for him.

We get many requests from Buckingham Correctional Center for copies of cases, and we have set up a system where we have a law student at the University of Richmond copy the cases, usually within a week's time, that we'll get those cases and submit them to the library at the Buckingham Correctional Center if the case is not already on file. There are times that we have to write to the Fourth Circuit to the Clerk to request copies of cases, unpublished cases.

Q. In your capacity as court appointed attorney have you ever had occasion to prepare motions for extension of time?

A. Yes, sir.

Q. How about motions for the appointment of counsel ever?

A. Yes, sir.

Q. Thank you, Mr. Woodson.

THE COURT: any cross-examination?

Cross-Examination

By Mr. Sasser:

Q. Mr. Woodson, you have a private practice?

A. Yes, sir.

Q. You spend about 40 hours a week in your private

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practice?

A. Approximately 40 hours. Some weeks it may be 30 to 40, some weeks it may be about 40 to 50.

Q. That is totally outside of the work that you do at Buckingham and outside the work you do at Powhatan?

A. If it was completely outside the work at Buckingham, and Powhatan I would say it would range 30 to 40.

Q. 30 to 40 not including work at those institutions?

A. Yes, sir.

Q. You spend 40 to 50 hours a month at Powhatan?

A. Yes, sir. It was less than that up to about maybe a year ago. the other attorney, Mr. Satterfield is slowing down.

He quit. And Mr. Blanton was appointed probably about two years ago. Mr. Baber has just been appointed. To take Satterfield's place. And work picked up. Then ranged probably 45 to 50 hours because of that to pick up the slack. Now it is starting to slow back down again.

Q. To what, 40 to 50?

A. Yes, sir.

Q. You spend 40 to 50 hours working for inmates at Buckingham?

A. Yes, sir. Mr. Anderson, an attorney in Buckingham is appointed to do the work I was appointed to do it when he could not do it. For a period of time he was not doing very much. He is back doing it now, so my work is slacking off up

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there, but in the last year it was probably 40 to 50 hours.

Q. There are a thousand inmates at Powhatan?

A. Yes, sir in excess of a thousand.

Q. Three hundred inmates at Buckingham?

A. Approximately, yes, sir.

Q. Have you ever appeared in court on behalf of a Powhatan inmate?

A. I have, yes, sir.

Q. In your capacity as institutional attorney?

A. No, sir. It was pursuant to court appointment by the judge.

Q. Ever appeared in court on behalf of a Buckingham inmate pursuant to to appointment as institutional attorney?

A. No, sir.

Q. You say you met with Joe Pain, death row inmate?

A. Yes, sir.

Q. Did you prepare any petition for Mr. Pain?

A. At the stage we met Mr. Pain --

Q. Yes or No?

A. No, sir, we were not requested to. He was appointed to be represented by Mr. Morchower, and I believe two other attorneys.

Q. You didn't offer him any legal assistance, did you?

A. We advised him, we talked with him. At that point he had not been sentenced by the judge. He was going back for

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sentencing hearing and he was asking us questions as to what he could do in respect to having an attorney appointed and his attorney replaced.

Q. You advised him only about having an attorney, isn't that correct?

A. We advised him as to what was going to happen. The judge would sentence him, he could appeal to the, again, Court of Appeals and Supreme Court and what he did after on habeas corpus.

Q. You didn't offer him substantive advice, did you?

A. We answered the question he had about the process, what was going to happen and what he could do in front of Judge Warren as far as objecting at that hearing.

Q. You never have done a petition for habeas corpus for a death row inmate, have you?

A. No.

Q. Never done a petition for writ of certiorari for a death row inmate?

A. No, sir, never have been requested to. We haven't had occasion to. I never represented an inmate on death row.

THE COURT: Is there any impediment to your doing that as your understanding of your responsibility?

A. Not my understanding, Your Honor, of the appointment. 053 point 1 dash 40 I understand we are to counsel and assist, and I don't know any distinction between a death row

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inmate and any other.

THE COURT: I was talking about a petition for cert., for example.

A. No, sir.

THE COURT: You would do what you were asked?

A. Yes, sir.

We have done several of those, but not death row inmates. For other inmates.

THE COURT: I understand.

Q. Do you know how much time is involved in a habeas corpus proceedings for a death row inmate?

A. No, sir.

Q. No further questions.

May I confer with counsel?

THE COURT: Well, the fact is you really haven't had much contact with death row inmates, have you?

A. No, sir.

THE COURT: Only two at Powhatan.

A. No, sir, I haven't. Joe Pain is the only one that I have spoken with, death row inmate. I did -- I spoke with one other inmate, but this was years ago. And at that time he represented by counsel and was going to sentencing, also.

TESTIMONY OF HARRY S. MONTGOMERY

July 11, 1986

[Page 310]

(Witness Sworn)

Harry S. Montgomery testified as follows:
Direct Examination

* * *

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Q. I hate to add one more piece of paper to the desk, but could he have access to defendants' exhibit book, please? I have will be referring to exhibit number 13 specifically with respect to this witness, Your Honor.

Mr. Montgomery, would you please state your full name?

A. Harry S. Montgomery.

Q. What is your address? Where do you live?

A. South Hill, Virginia.

Q. How old are you, Mr. Montgomery?

A. 59 years old.

Q. What is your occupation?

A. I am an attorney.

Q. All right. How long have you been an attorney?

A. Since 1952.

Q. Where did you go to law school?

A. University of Virginia.

Q. All right. Since you graduates from the University of Virginia, have you been practicing law?

A. Yes, sir.

Q. Would you tell is what your legal background is, please?

A. I have a general practice in the town of South Hill, and this general practice is the usual rural practice. We have 18 attorneys in Mecklenburg County, and all of them are in general practice.

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This is engaged corporate work, title examinations, domestic, criminal and other civil matters.

Q. All right. Has this been your continuing nature of your employment since you graduated from law school, the nature of your job?

A. Yes, sir.

Q. All right. Have you, did you have occasion to be appointed as a court appointed attorney to Mecklenburg Correctional Center pursuant to 53 point 1-40 of the code?

A. Yes, sir.

Q. All right. When was that?

A. This was in november of 1983.

Q. All right. Which Judge appointed you?

A. That was Judge McCofmick.

Q. Was this specifically for Mecklenburg Correctional Center?

A. Yes, sir. I was also appointed for Camp 4 in 1973, I believe. In the same capacity under a predecessor of the statute.

Q. What is camp 4?

A. Camp 4 is a hundred man field unit which is located in Baskerville, Virginia, which is the lighter security type unit, which the Department of Corrections maintains.

Q. How far approximately is Baskerville Unit 4 from

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Mecklenburg Correctional Center?

A. I would say it is about eight miles.

Q. Now, would you please tell us what your duties are and what role fulfill pursuant to 53 point 1 dash 40 with respect to your occupation and your duties at Mecklenburg?

A. The code provision states that the circuit court shall appoint a discrete and competent attorney on the motion of the Commonwealth attorney, I believe, and at the suggestion of the Department of Corrections for each unit.

The function of the inmate attorney is to counsel and assist inmates in matters concerning their incarceration.

This I interpret to be, -- well, I call it incarceration and conditions of incarceration.

Q. All right. Now, pursuant to that statutory mandate what do you do at Mecklenburg Correctional Center?

A. I visit inmates at the institution, and as such counsel

and assist inmates in the preparation of their various documents, petition, 1983, habeas corpus petitions, their actions under the Virginia Tort Claims Act, name change petitions, if it is a of religious nature, and other items, but not civil work.

Q. By --

A. By civil I am speaking of claims, unemployment compensation claims, V. A. benefits, things of this nature, suits.

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A. You want me to read them?

Q. I don't want you to read it, I want you to tell us whether these were done pursuant to visits to death row and to whom?

A. Well, documents that have been signed by three different individuals. One was David Pruitt, who is one of the newer inmates on death row.

Mr. Pain, I believe was another inmate on death row who signed one of these documents.

And I will have to refer to my notes. Joseph Pain document was signed on 6/21/86 and witnessed by Gregory Brandon, who I believe was a guard.

The David Pruitt document was signed April 19, 1986 and was witnessed by Stovall, the guard, I believe, and Mr. Hodges.

The third is signed by Walter Correll, and witnessed by Fitzgerald, who is an inmate on death row. And Mr. Agee, I believe, possibly, who is a guard.

Q. All right.

THE COURT: Let me ask you, sir.

A. Yes, sir.

THE COURT: Have you been monitoring death row in the same manner ever since your appointment, or did the institution of this suit precipitate any further action on your part?

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A. I have taken a more active interest in the death row situation since the Earl Washington case arose, which occurred back last summer.

THE COURT: Before that.

A. Before that the attorney situation in death row is a matter which was generally been under the jurisdiction of Marie Deans, Your Honor, to be quite honest.

THE COURT: You mean volunteer.

A. Volunteer attorneys.

THE COURT: Do you know who prepared this document, defendants' exhibit 13?

A. Mr. Gorman and I together prepared the document.

THE COURT: After the institution of this suit.

A. Yes. What was the date of the institution of this suit, Your Honor?

THE COURT: I don't know, I am just the Judge.

Q. Back in last year.

THE COURT: All right.

A. Yes, it has occurred since that time.

THE COURT: Were you instructed to, or did you think it the better part of valor to increase your monitoring of the death row -- I want to know whether the suit prompted -- what did you do before the suit?

A. All right, Sir. Prior to the suit being --

THE COURT: I am not critical if you increased it,

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that is great. I just want to know.

A. Yes, sir, prior to the suit being filed the death row situation was taken care of by Marie Deans and Joe Giarratano as far as acquisition of volunteer attorneys was concerned.

In effect what they did was to relieve me of my responsibilities as far as preparation of petitions and things of this nature.

THE COURT: But that wasn't by any formal agreement.

A. No, no.

Requests that I have from people on death row, Your Honor, were for primarily ministerial functions. Things that really didn't amount to a great deal. 1983 -- pardon me.

THE COURT: I was going to ask you, have you ever been asked to prepare a petition for cert.?

A. No, sir. I have never been asked to prepare a petition

for a writ of certiorari.

THE COURT: Habeas corpus?

A. I have never, never been asked to prepare a writ of habeas corpus.

THE COURT: A stay of execution?

A. No, sir.

THE COURT: Well, you understood, I gather, that Miss Deans and one of the inmates would take care of the needs of the people on death row, so let them do it, is that a fair conclusion?

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A. Well, from the time I arrived until the Washington situation arose, everyone on death row had an attorney, Your Honor. And I didn't volunteer to -- I didn't walk up to an inmate and say, let me help you with your writs or petitions, obviously, because they did have retained or volunteer counsel.

THE COURT: All right.

Well, one more question. I am sorry. Was there some confusion in your own mind as to exactly what your responsibilities were? Because I must tell you, I have gotten some testimony that court appointed counsel deemed their responsibility to be less than some other court appointed counsel. Was there any confusion in your mind as to what you were to do under that statute?

A. No, sir. From the time I was appointed in '72 at Camp 4, there has never been any confusion of what I was supposed to do with inmates, that is, to, -- not to act as attorney of record, but to go up to that point.

THE COURT: Help them in -- actually prepare petitions for them?

A. Yes, sir.

THE COURT: If need be?

A. Yes, sir.

THE COURT: All right.

By Mr. Gorman:

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Q. Mr. Montgomery, Did Mrs. Deans ever ask you to prepare any petitions for certiorari?

A. No, sir.

Q. For any inmate?

THE COURT: Would you have felt obligated to do it being court appointed if Miss Deans as an emissary of somebody on death row called you and said, Mr. Montgomery, would you please prepare a petition for cert. for this person?

A. Absolutely, sir, that is why I urged her on many occasions, Marie, get your volunteer attorneys, or I didn't use the word "volunteer," I said, get your attorneys, let's get this man represented.

THE COURT: Well, supposed she said, will you, Mr. Montgomery handle it? You are court appointed.

A. She didn't, Your Honor.

THE COURT: I said, if she had would you have felt obligated to do so.

A. Yes, sir.

THE COURT: You still feel that way?

A. I feel right now today I am obligated.

THE COURT: Could you really handle 30 death row inmates?

A. Not simultaneous, no, sir.

THE COURT: Could you handle two?

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A. I think it would be, I think it would be tough with the one-man general practice to handle two habeas corpus petitions

THE COURT: Any kind, or what I am trying to find out is if you view the problems of death row inmates to be a more complicated nature at least the efforts that you make for them.

A. Yes, sir, because of the relatively newness of the statute, it is a completion statute, it is not understood by a lot of lawyers.

THE COURT: Or Judges, including this one maybe.

A. And it is a complicated statute, Your Honor. No question about it. It is complex.

I never denied that.

THE COURT: Well, were you ever asked anything in

the Washington case for example to do anything?

A. No, sir. I have never been asked to do anything, Your Honor. No inmate has said, Mr. Montgomery, get me a stay, or words to that effect. Mr. Montgomery, would you file a writ or get me back in court?

THE COURT: You could get a complex. All right, Mr. Gorman.

By Mr. Gorman:

Q. Have you ever been requested by Joseph Giarratano or any other inmate to go see another death row inmate and help

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him?

A. Not for the purpose of filing a petition, no, sir.

Q. All right. Have you received questions on other occasions for other purposes?

A. Oh, yes.

I don't, and I discussed his case last Saturday, and I did some research as a result of that discussion down in the Law Library at Mecklenburg. Unfortunately the leading case had been torn out of the book.

Q. You mean in the Law Library?

A. In the Law Library. And --

THE COURT: You mean you just can't trust anyone.

A. No, sir, that is an occupational hazard, unfortunately. It is a fine library, it is a great library.

THE COURT: That is what I understand.

A. But unfortunately it is abused at times, and this is one of the abuses. An inmate, I would assume, would find a case to his liking and he would feel like he should be attached to it back in his cell.

By Mr. Gorman:

Q. Mr. Montgomery, has Marie Deans asked you to prepare motions for extension of times in cases?

A. Yes, sir.

Q. And what has your response been to her?

A. I have done exactly what she wanted me to do.

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Q. Did you let Marie Deans know that you were available in the event that she was unable to locate volunteer counsel?

A. I think that has been the underlying fact throughout our relationship. That I was the safety net at Mecklenburg. If we ran into a situation or they ran into a situation which volunteer counsel could not be obtained, I would have to do it, either that or step down in my position and ask to be replaced.

THE COURT: As far as you know, Mr. Hodges' attitude is the same.

A. Yes, sir. Yes, sir, I think so.

Q. Going back to this monitoring system that you have developed, would you elaborate on that a little bit?

A. I felt like in discussing the death row situation with Marie, I felt like she had a pretty good handle on the cases and where they stood on the appellate level. However, I felt like that someone else should be doing it, too.

And I started to, I made effort, made inquiries at the administration level, I made inquiries at the Attorney General's Office, and I actually started following each case --

THE COURT: When did this start?

A. This probably started in February or March. February, I believe.

Q. Did any case in particular precipitate your starting this monitoring system?

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A. Well, the realization finally hit me that I was going to be caught with some death row inmates.

Q. When did that realization hit you?

A. Of course, the Washington case precipitated it, but the more I talked to Marie Deans and Joe Giarratano the more it became obvious that they were having very difficult time acquiring volunteer attorneys. I notice for instance that the attorneys they were getting in the last year or so it seemed to be coming

from away from Virginia, like New York and Washington and so forth and so on. It seemed that they were having to go further away from Virginia to get their attorneys.

And what I did, I simply took a computer print out, Your Honor, so I could carry it away with me, a real thin folder and started making notations on where they were.

I asked the administration to —

Q. Excuse me. When you say where they were, what do you mean?

A. In the appellate level.

* * *

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THE COURT: That is redundant.

A. Let's say I have a serious offense, a serious felony situation at Mecklenburg in which I would — a man wants to go up on habeas.

The first thing I have to do is find out what resources he has available, every scrap of legal paper in his possession.

I want the transcript, I want the indictment, I want jury instructions, I want anything I can lay my hands on pertaining to that trial.

And of course I want his version, which is the most important part, and that is why we start where he thinks those errors were committed. What basis he thinks he should be able to get back in court, because he is the one man that was — who is there, he is the one man who is there.

Now, generally after getting a description of where I think the man is going, I will go into the records room at the prison and pull his records, pull his file. And generally the presentence report will be there.

And I will get the report and read it as the probation officer has written it, particularly the defendant's version at that time. That gives me a separate angle to work from.

Now, there some instances we have inmates who have no papers at all who may have plead guilty. And has nothing, except I want to get back in court. If I can get back before

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the Judge, I am sure he will reduce my sentence.

That is, of course, is the most difficult type of case to work with. But at any rate, I write for transcripts, which is a separate story in itself.

I will write to the Clerk of the Court and get the other documents which I have mentioned. Then I will do legal research in it, in the Particular case he is talking about.

I will take a habeas corpus form, of course, it is form pleaded, and give it to the inmate and I say in this, in your grounds you state in there in your own words where you think the errors were committed. And then, after that, we will work on it together. We will, I will reword it and try to put it in into somekind of legal terms, to keep it as short as possible, Your Honor.

THE COURT: How many petitions would you estimate you have drafted, habeas corpus petitions for inmates in the last two and a half years?

An approximation.

A. Probably 50, I would say. Possibly more.

THE COURT: Could you explain, Mr. Montgomery, if there is an explanation, as to why the impression apparently has gone through death row that you don't prepare petitions?

That may be an impossible question for you to answer. But you may also know.

A. I think normally when a man goes on death row he is

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sitting up there waiting for the result of his direct appeal to the Supreme Court. And once he hears from that, he also gets a letter several days later saying that I am no longer representing you.

The man feels at a loss, but in the meantime he has talked to the other attorneys, or rather, I am sorry, the other inmates on death row. All of them have attorneys, some of them being up there three or four or five or six years, and the fellow says, I am getting ready to be executed.

Now, he knows that the other inmates on death row

have attorneys who have been acquired by outside efforts, volunteer attorneys, and he automatically looks at Marie Deans and Joe and whoever is associated with them.

And I don't know, Your Honor. I made an effort. I have explained it at best I could to the inmates, particularly since the Washington situation has arisen. And they should know.

THE COURT: Would you agree, or are you conscious of the fact that there is that perception among death row inmates that Harry Montgomery -- is Harry right?

A. Yes, sir.

THE COURT: Because they have been addressing you by your first name, Harry Montgomery doesn't draw petitions, doesn't --

A. I never had an inmate tell me that.

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THE COURT: You didn't know that that was their perception?

A. Well, since this case has arisen, and I have read a couple of the affidavits, I am realizing that perhaps they do feel that way.

THE COURT: You tell me that it is an erroneous perception.

A. Absolutely. I am obligated. I am absolutely obligated, Your Honor.

By Mr. Gorman:

Q. Mr. Montgomery, in the preparation of habeas corpus matters do you have occasion to call the trial attorney or anyone else in connection with preparation of the initial petition?

A. Yes. I have talked to attorneys, trial attorneys on occasion in other cases. Of course again I haven't done it on death row cases. Always very suspicious of me. And they are suspicious of any ineffectiveness assistance of counsel claims.

But for instance in the Boggs situation, who is the one inmate on death row who is exposed without an attorney, now at the present time I recognize his exposure. I made an effort to talk to Boggs. For instance, I have read him this document, which is Exhibit 13, and discussed my services at length with him.

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I said, Mr. Boggs, sooner or later if you don't get an attorney I am going to just have to prepare some papers for you and get you back in court.

I have asked Mr. Boggs, I said, Mr. Boggs, would you sign a release that I can send to your attorneys and ask them to release the full record for my use?

And he says, well, I will have to talk to Marie Deans about that.

I wrote to the two attorneys myself, sent Mr. Boggs a letter. Perhaps I shouldn't have, but I did.

And I just got a reply back from one of the attorneys yesterday. Told me under what conditions he would release the record, which involved a release of the information, a signed release by Mr. Boggs, rather, and I could come to his office and examine the record, and what he was going to charge me for making copies and things of this nature.

So, I have talked to Marie Deans about where is the record. I said, sooner or later I have to prepare the petition if you can't find a volunteer attorney. And I have talked to the Attorney General's office.. Where can I get a record?

And finally in Mr. Boggs' case he had a partial record. He had the appendix which was filed with the Supreme Court.

I came up to death row and he let me borrow his

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appendix. And I took my secretary up there at the administration building and she made copies of the appendix in addition to some of the pleadings which he did have, and I took them back. But he wouldn't even release these documents to me until he asked Joe. Said, Joe said okay, and Joe said, sure, go ahead, yes.

Q. In connection with your work on death row, have you worked on petition for certiorari for any inmate?

A. Yes, sir, I did some work for Edmonds on cert.

Q. What did that work consist of?

A. Because I read a copy of his case, I started comparing the -- I didn't have the record, don't have it now. I started

comparing other death row cases and what issues were brought up, the boiler plates, what was omitted, and what I thought was the thinking in terms of what kind of novel issue we could present on cert. to the Supreme Court.

Q. All right. Was there some reason why you didn't prepare the petitions?

A. He obtained a volunteer attorney.

Q. Mr. Montgomery, going back to one of your earlier answers, I believe you indicated that the work load became too severe on you, you contacted Mr. Peterson of the Virginia State Bar. Is there anyone else that you would contact in that situation?

* * *

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And we go from -- we have a free reign over the the institution. We can go anywhere we want, and we do not have escorts.

Q. Does this include death row?

A. Includes death row.

Q. All right.

Do you have occasion to go to the law library when you are there at the institution?

A. Yes. About half the time I will work out of the law library. I have the resource material there. It is in the basement of building 3. It is in the center of the area, and if I am going to building 2, I can get my material from building 2 and go up there and bring it back and I don't have to lug so much paper around.

Q. All right. In connection with providing legal services to death row inmates and other inmates there at the institution, have you developed any specific personal resources to do this?

A. Yes. Over the period of time I made a conscious effort to obtain as much information on the death sentencing process, the laws concerning death capital offense as I possibly could. And I have received material from Marie Deans for instance through Joe or from Joe. I brought a number of volumes myself.

Q. Would you tell us what these materials are as you go

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through them?

A. Mr. Gorman I made a list of volumes in my personal library. Includes Criminal Law Digest, two volumes.

Rights of Prisoners, A.C.L.U. volume.

Post Conviction Remedies by Larry Yackle.

Attorney General's Habeas Corpus Manual.

The Balske Manual.

Q. What does that concern?

A. Post conviction remedies in capital cases. That was by the National Association of Criminal Defense Lawyers. And I believe this came from Mr. Giarratano.

Moore's Federal Practice Rules and so forth.

Clark's Manual, Clerks Manual, I am sorry, Fourth Circuit Court of Appeals.

On prisoners petitions.

The '83 Manual of Attorney Generals of the Death Row Updates, which came from Marie Deans

Originally, I believe, which is a rather voluminous stack of documents which were, I believe, published in California.

How to Litigate in Federal Court. Prisoners document.

Criminal Detainers by Abramson.

Prisoners Source Book by Herman and Haft.

Of course, Federal Habeas Corpus by Sokol.

Prisoners Self-Help Litigation.

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THE COURT: Excuse me. Give me a moment. I apologize.

A. Criminal Detainer by Abramson, The rights of Prisoners by Gobert and Cohen. That is a --

THE COURT: Let's see if we can't slow it down. You feel like you have an adequate library and you have access to adequate legal material.

A. I think I have got more death row information than the Attorney General's office has got, Your Honor.

Q. All right.

THE COURT: No comment.

Q. Mr. Montgomery, would you please tell us about the method and payment of compensation to you as court appointed

attorney at Mecklenburg?

A. Yes.

I use a legal pad to make any note on. I make a separate legal pad to list appointments, another legal pad of things to do. So I can cross reference everything. And I always keep a legal pad which is a statement which I keep current. At the end of the month, I have my secretary type up the statement, which I sign and present to the clerk of the court who I believe draws an order and the circuit court judge signs it. And the next thing I know, after a lengthy period, a check comes in.

Q. Are you paid on hourly basis?

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A. Paid on an hourly basis.

Q. What is the rate per hour that you are paid?

A. 50 dollars an hour.

Q. All right. In addition to your hourly rates, were you reimbursed for your expenses?

A. Yes, postage, copying. I order a large number of copies, for instance, from the state library where I keep a running account. I pay them monthly.

Q. All right. Have you ever had any voucher refused by the judge or the clerk?

A. No, sir. I never had one questioned.

Q. Thank you, Mr. Montgomery. That is all I have.

THE COURT: All right. We are going to take a brief recess before cross. You may remove the inmates, please.

(A recess was taken.)

Cross-Examination

By Mr. Landers:

Q. Mr. Montgomery, Let's talk about Rickey Boggs for a moment. Isn't it the case on or about March 28 or March 29 of this year you met with Mr. Boggs for over an hour?

A. You say 28 or 29?

Q. That is correct, sir.

A. The 29th is correct date.

Q. And you met with him for over an hour, didn't you?

A. Yes, sir.

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Q. Now, at or about the time you met with Mr. Boggs on March 28 and March 29 he gave you lots of pieces of paper didn't he, lots of documents?

A. He showed me a number of documents.

Q. He showed you, he didn't give them to you?

A. Well, I had them in my hand. I looked at them.

Q. Did you take them away with you?

A. No, sir.

Q. Did you ask him if you could take them away with you?

A. No, sir.

Q. Why not?

THE COURT: Wait a minute. Don't let your enthusiams run ahead of you.

Q. I will try not to.

THE COURT: Let him answer.

A. Well, I didn't. I did --

Q. You did not ask him if could take them away with you?

A. Not on that particular day.

I made an inventory of the material which he had.

Q. When, if ever did you ask him if you could take his materials?

A. All right, sir, on May 8 of 1986.

Q. At the time you met with Mr. Boggs on March 29, I believe we established -- did you know that his petition for certiorari to the U.S. Supreme Court had been denied?

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A. Yes, I believe I did.

Q. Did you know that the next procedural step for Mr. Boggs to take would be to file a petition for habeas corpus?

A. Yes, sir.

Q. When you met with Mr. Boggs on March 28 March 29, did you read the materials he had in his petition while you were

with him in the cell?

A. I wasn't in the cell with Mr. Boggs, Your Honor.

Q. I stand corrected, but my question remains, did you read the materials that he had?

A. It was impossible because --

Q. If you could answer my question yes or no, I would appreciate it.

THE COURT: Move the mike closer to you, please.

A. No, sir.

I did not read all the material.

Q. Did you read any of the material?

A. Yes, sir.

Q. Which pieces of material did you read, sir?

A. I believe I read the brief of the appealants, which was a 47-page document.

Q. And you read that while you were having your interview with Mr. Boggs?

A. Yes.

And making an inventory of the material.

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Q. Why did you wait until sometime in early May to ask Mr. Boggs for possession of the rest of the documents that he had?

A. Well, Marie was attempting to obtain volunteer attorneys.

Q. Was Miss Deans still attempting to obtain volunteer attorneys in early May?

A. To my knowledge she is attempting now.

Q. My question remains then, why did ask you her in early May, why did you ask Mr. Boggs in early May where are his materials?

A. Because I wanted to prepare for the writing of the petition if it became necessary.

Q. But you didn't feel the need to be prepare for the writing of the petition on May, on March 29, 1986?

A. I probably felt that Marie was going to obtain an attorney at that time.

Q. But you didn't feel the need to be prepare for the writing of the petition on May, on March 29, 1986?

A. I probably felt that Marie was going to obtain an attorney at that time.

Q. You didn't feel that Miss Deans was going to obtain an attorney on May 5?

A. Well, time was flying now, Your Honor.

THE COURT: Had an execution date been set?

A. No, sir, I don't believe so.

THE COURT: I take it this was a death row inmate.

A. Yes, yes.

An execution date has not been set yet, I don't

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believe.

THE COURT: Still?

Q. Did you obtain any of Mr. Boggs materials subsequent to that March 29 meeting?

A. Well, I said we went back up there in June, in May, and we made copies of all the material which he had.

Q. Have you read those materials.

A. I read about half of them at this point, perhaps more. Probably more.

Q. Can you tell me what the materials -- I am sorry, sir. Go ahead. Complete your answer.

A. Yes. Probably more than. But unfortunately it is an incomplete transcript.

Q. When did you determine it was an incomplete transcript?

A. When I got down to the copying room where I made the copies.

Q. Could you have determined it was an incomplete transcript if you read the materials on March 29 rather than in June?

A. I don't think I went into the appendix that closely at the earlier date in March.

Q. Could you tell me what materials Mr. Boggs turned over to you in June?

A. His transcript of motions, transcript of testimony,

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his presentence transcript, the brief of the appealants, the order extending time in the U.S. Supreme Court to file petition for a writ.

This involved a five-day trial and apparently 13 hundred pages of transcript.

Q. I would like you to tell me which half of this material you read and which portion of it you have not read?

A. I think I have read more than half of it.

Q. Fine. Would you tell me what you have read?

A. I have read all of the transcript that I have available.

Q. What else have you read, sir, if anything?

A. I read the motions. I don't believe I read the presentence transcript.

THE COURT: Let's see if we can't jump ahead a little bit. You did this so that you could prepare a habeas petition?

A. Yes, sir. If it became necessary.

THE COURT: Well, it obviously became necessary, didn't it, once cert. was denied? Either that or ultimately he was going to be executed.

A. Your Honor, I in no way want to discourage anyone else from obtaining a volunteer attorney.

THE COURT: That is all right. Let me interrupt you. I understand that, I can appreciate the position that you are

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in. I just want to know, have you -- you got the papers so that you could prepare a petition for habeas, I take it. Is that correct?

A. Yes, sir.

THE COURT: Have you done so?

A. No, sir, I haven't prepared it.

THE COURT: Not been. Has been done yet.

A. No, sir. I have been reviewing all the documents.

Q. Will there come a time, Mr. Montgomery, when you will finish reading the papers that Mr. Boggs supplied to you and draft a petition for habeas?

A. I anticipate that I will probably have to obtain the rest

of the transcript from another source. To complete my work on the transcript when I can obtain it, I don't know. As I said, I have been trying to get this material.

Q. When did you first attempt to contact Mr. Boggs' attorney to obtain the material?

A. Well, I first asked Mr. Boggs to write his attorneys and ask them to send the transcript, the complete record. The following week, I believe I came back and checked with Mr. Boggs to see if he actually had done it. He said he had not.

Q. Can you tell me when this was, sir?

A. I will have to go back through all of my notes.

Q. Do you have an approximate recollection of what month

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of the year it was?

A. No, sir, I won't be exact.

THE COURT: No, no, we are not going through those notes. I appreciate your willingness to do it, but I am not willing to wait. Move.

By Mr. Landers:

Q. Does Mr. Boggs have an execution date?

A. No, sir.

Q. Do you know when Mr. Boggs will obtain an execution date?

A. No, sir. I have no knowledge.

Q. Could an execution date for Mr. Boggs be set next week?

A. I suppose legally it could, yes.

Q. I don't mean to misquote you, so tell me if I am in error. I believe you testified that from the time you arrived at Mecklenburg until the time that this suit arose everybody at Mecklenburg had counsel, is that right? Every death row inmate, I am referring to now.

A. I am under the impression they had counsel at Mecklenburg up until the Washington case incident arose.

Q. And that incident you are referring to is his pending execution without legal representation, is that right?

A. Yes, that was the incident.

THE COURT: Did you get involved in the Washington

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case?

A. No, sir.

THE COURT: Well, correct me if I am wrong, but wasn't that the situation in which an execution date was rapidly approaching and they couldn't find a lawyer for Mr. Washington?

A. This was --

THE COURT: That your understanding.

A. This was a case, Your Honor, in which the man was actually transported to Richmond within the 15 day rule before somebody started hollering. And I really --

THE COURT: I for one I think started hollering, I am not sure, but somebody wrote me. And I wanted to be sure it was the same person.

And the record should show this. I thought I already put it in the record, it may have been Mr. Giarratano who wrote, me, but he said there was a man about to be executed and they couldn't find counsel, and I didn't want to inject myself in the thing, but I thought he ought to have counsel. And I checked around, I don't know whether I was able to get counsel for the man or not, but I certainly know I made an effort by calling the local, I think young Tim Kaine got involved in some way.

Well, the point is, you and I both knew that this was a fairly desperate situation. Well, if a man doesn't have

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counsel, he is going to be executed within 15 days, in my mind that is desperate. Maybe not.

A. Yes, sir.

THE COURT: I think I am trying to cut down. I know he is going to ask this question. But he is going to do it like this. He is going to say, Mr. Montgomery, you knew about this, did you go to Mr. Washington or did you file a petition on his behalf, or offer to?

A. First of all, I did not file a petition on his behalf. I did not offer. And I did not have knowledge of the fact that the man was going to be transported and so forth until after it had

happened. Until after it happened.

THE COURT: You mean by the time that you knew of the situation.

A. The man was out of my jurisdiction.

THE COURT: I see.

By Mr. Landers:

Q. Now, Mr. Montgomery -- I will come back to that point Your Honor made in a moment as soon as we can find the appropriate exhibit.

Mr. Montgomery, from the time that you arrived at Mecklenburg until the time of Mr. Washington's scheduled execution date, which I believe was sometime in February of 1986, was there a period in which an inmate named Willie Leroy Jones, death row inmate, had no counsel?

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A. I am sorry, I don't know.

Q. Was there a period in which an inmate named Tuggle was unrepresented by counsel?

A. I don't know.

Q. We have already established there was a period Mr. Washington was not represented by counsel?

THE COURT: You go ahead and ask questions. If you are going to testify, I will swear you in.

Q. Was there a period in which Mr. Edmonds was unrepresented by counsel?

A. Yes. There was a period in which Mr. Edmonds was unrepresented by counsel.

Q. Was there a period in which Mr. Poyner was unrepresented by counsel?

A. Yes.

Q. Let me ask you this, Mr. Montgomery. Did Mr. Giarratano, you know Giarratano?

A. Very well.

Q. He is right over there.

Did Mr. Giarratano ever ask you to assist him in drafting a cert. petition for Mr. Poyner?

A. No, sir.

Q. Did he ever ask you to give him any help at all in connection with the cert. petition for Mr. Poyner?

A. Yes.

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Q. Sorry, sir?

A. He asked me to make copies of Poyner One. There were multiple convictions in the Poyner case.

I came up to death row probably on a Saturday, and he asked me to make copies. He said he couldn't get these people in administration to make copies. That he would finish it.

So I took the cert. and took it back to the administration building, I believe. Made copies and brought them back and gave them to Mr. Giarratano.

Q. And that is all he asked you to do to help him with the cert. petition in any of the Poyner cases?

A. In the second, Poyner Two, this was an after the fact situation in which he gave me again, I believe it was three documents and said that they had been filed, I believe, and asked me to make copies. He wanted copies for his files, I believe.

And I took them again and made copies. And I don't believe I brought them back by hand. But I believe I circulated it through the delivery system up there at Mecklenburg. At least I have a letter to that effect.

Q. That is all Mr. Giarratano asked to you do with respect to Poyner Two?

A. As far as Poyner Two or One.

Q. Do you know why Mr. Giarratano was asking you to do

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anything with respect to the Poyner cases?

A. I didn't know. I was very surprised on Poyner One when he said, I have done it. And --

Q. What did you take him to mean when he said, I have done it?

A. Well, words to this effect. That I prepared it.

Q. I being Mr. Giarratano?

A. Giarratano had prepared it.

Q. Before he told you that, had you been aware that he was preparing certiorari papers for Mr. Poyner?

A. Joe at one point made the remark, and I took it as a facetious remark at the time, he said, Marie can't find an attorney and it looks like I am going to have to do it. Words to this effect.

Q. When he uttered those words, did you volunteer to prepare cert. papers for Mr. Poyner?

A. No, I did not.

I'll be honest with you, I felt like, well, Joe knew what he was doing as far as preparation of these documents are concerned, and he obviously didn't want me to help him.

Q. Did he tell you?

A. I didn't ask him.

Q. Thank you, sir.

Was there a period from the time you arrived at Mecklenburg to the time of Mr. Washington's scheduled

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execution that Mr. Watkins was unrepresented by counsel.

A. Yes, that is true. But I don't recall the dates.

Q. But you know that it was for Mr. Washington's scheduled execution, don't you?

A. No, sir, I don't know that.

Q. I think you always mentioned in your testimony, sir, that Mrs. Deans asked you to prepare one or more motions for an extension of time, am I right, for a death row inmate?

A. Yes.

Q. And you prepared those positions for her?

A. Yes. I did everything Miss Deans asked me to do.

Q. And that includes any request she may have made of you with respect to certiorari petition for Mr. Poyner?

A. Which she didn't ask me to do.

Q. How lengthy were the motions that Mrs. Deans requested you to prepare?

A. That was a mandate petition I believe on the Clossa situation.

- Q. How long a document was that, sir?
- A. That couldn't have been over two or three pages.
- Q. Hm Um Hum. What about any other motion Mrs. Deans asked you to prepare? How lengthy a document was that?
- A. Well, generally what she has asked me to do is an errand boy nature, ministerial acts rather than any professional, real professional effort.

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- Q. Fine. Do you know an inmate named Walter Correll?
- A. Yes.
- Q. Have you -- is he a death row inmate?
- A. Yes.
- Q. Have you met with Mr. Correll?
- A. Yes.
- Q. Did you ever tell Mr. Correll you couldn't be his lawyer, but you could help him find a lawyer?
- A. I don't believe I have ever told an inmate that I could help him find a volunteer lawyer.
- Q. But you did tell him you couldn't be his lawyer?
- A. I couldn't represent him as attorney of record.
- Q. I would like you to remember for me as precisely as you can what you told Mr. Correll. Did you ever use words, I cannot be your lawyer? Did you ever use those words in speaking to Mr. Correll?
- A. I tried to be as precise as I can in talking to inmates along those lines because I want them to understand that I cannot be an attorney of record, but I can help with petitions, writs and filings, motions and everything but being attorney of record.
- Q. With respect, sir, that doesn't answer my question. Did you say to Mr. Correll these words, I cannot be your lawyer?
- A. I feel -- I can't remember an exact conversation with

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Mr. Correll, the exact words, no. But, this is what I meant. If he

interpreted otherwise, I really can't help it.

It is his interpretation.

- Q. Mr. Montgomery, do you sign any court papers for inmates as counsel of record?
- A. I don't know of any.
- Q. Why don't you sign papers as counsel of record?
- A. Because my interpretation of the statute and Smith v. Bounds does not require me to serve as an attorney of record.
- Q. Is there any other reason why you don't sign court papers for inmates as counsel of record?
- A. Well, I think if I served as counsel of record, the State of Virginia would have a right not to pay me. I think that I just don't think I can serve as attorney of record for an inmate at Mecklenburg.
- Q. Is there any other reason why you don't sign papers for inmates as counsel of record?
- A. That is enough, sir.
- Q. So do I take it your answer is no?
- A. I do not serve as attorney of record for inmates at Mecklenburg.
- Q. Have you ever given another reason why you did not sign court papers for inmates as counsel of record?
- If you recall.
- A. I cannot recall, really.

* * *

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- Q. Mr. Montgomery, assume with me for a moment that a death row inmate at Mecklenburg today receives an execution date.
- And his execution is scheduled for August 10, 30 days from now. Would you be able to spend the time necessary to competently represent him in post conviction proceedings?
- A. I think I would have to.
- Q. Tell me, if you would, what would you do?
- A. What would I do?

* * *

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Q. I take it you don't feel that you would really have time to investigate the facts very thoroughly in this kind of time?

A. We want to keep this guy out of the chair. We want the facts adjudicated, we want him to have his full rights before the Court.

THE COURT: Well, do you deem 30 days to be inadequate time to prepare how you think it ought to be prepared?

A. Of course it depends on the record, Your Honor.

THE COURT: Well, you have a 16 hundred page record.

A. And my familiarity with the record.

THE COURT: This is somebody who calls you in as Mr. Landers has suggested and gives you a complete record, the case you are talking about. And you say that you are rushing, so I gather that you don't feel that 30 days is really adequate time for you to really do the job you would like to do. Is that a fair statement?

A. I think it probably needs 30 days, more than 30 days. I would like to have more than 30.

THE COURT: I have never seen a lawyer yet that they never do today what could be put off until next year. And judges, too.

Q. If you were faced with the 30 day deadline, though, would you attempt to conduct a factual investigation?

A. I would try, yes.

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Q. What would you do?

A. I would try to talk to his trial attorneys. I have tried to talk to the Commonwealth Attorney about the situation, what he knows about it. Find out something about witnesses. Telephone calls to witnesses. And just depending on what the case involves.

If we are talking about boiler plate parts of the motion, I feel like if I got into a problem, though I feel like our Circuit Court Judge would be extremely cooperative in me bringing in outside counsel and paying him.

Q. How much time do you think it is likely to take if you were faced with a 30 day deadline to get in the papers that you described to us today?

A. I have no idea how many hours it would take.

Q. Let's assume for a moment it would take a hundred hours over the next 30 days. Would you have the time to do it?

A. I would make the time. I would have to have the time.

Q. So you would have the time to do it?

A. I would make the time to do it.

Q. What if it took 2 hundred hours over the next 30 days, would you have the time to do it.

A. 2 hundred hours in 30 days? Probably, yes.

Q. Now, as I understand it, you have a private law office, is that correct?

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A. Correct.

Q. You have regular office hours?

A. Yes, sir.

Q. What are those office hours?

A. I try to get there early. I open the door at 8:30.

Q. And when do you close the door?

A. 5:30.

THE COURT: I tell you, the Bar has changed. Everybody works half day now.

A. I said 5:30, Your Honor.

THE COURT: I know it.

No, that is a full day.

Q. That is Monday through Friday, Mr. Montgomery. You remain with your office open?

A. Yes. On Saturday we go to Mecklenburg.

Q. Would you be willing to close your office for a month if you had to devote 2 hundred hours?

A. To keep a man from being electrocuted without adjudication of rights, I certainly would.

Q. Um hum.

But you don't really know how much time it is going to take, do you?

A. No, sir, I don't know.

TESTIMONY OF JAMES SPERRY

July 11, 1986

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(Witness Sworn)

James W. Sperry testified as follows:

Direct Examination

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By Mr. Gorman:

Q. Mr. Sperry, would you please state your full name for the record?

A. James W. Sperry.

Q. What is your business address?

A. 114 West Grace Street in Richmond.

Q. How old are you, Mr. Sperry?

A. 27.

Q. 27, all right.

What do you do for a living.

A. I am an Attorney.

Q. How long have you been practicing?

A. I passed the Bar in 1983.

Went to Marshal Wyth School of Law, William and Mary, and graduated in 1983.

Q. Did there come a time when you were appointed the Institutional or an Institution Court appointed Attorney for the Penitentiary here in Richmond?

A. Yes, that was in December of Last year. December of '85.

Q. Who appointed you to that position?

A. Judge Nance, Circuit Court City of Richmond.

Q. When that appointment occurred, how many other Institutional Lawyers were there for the Penitentiary?

A. I believe there were three at that time.

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Q. How many are there currently?

A. As far as I know, there are two, but I have been told by one of the Attorneys, by Mr. Glenn Blazek, that he is planning to resign.

Q. Is that two others in addition to you?

A. There was, and there was another Attorney by the name of Hardy, who resigned I think after I was appointed, but I am not sure when she resigned, for reasons I think I talked to her and she — in any event she resigned.

Q. Does that leave you and Mr. Blazek?

A. Yes.

Q. Have you made any effort to contact the Judge about this situation?

A. I talked to the clerk of the court who originally contacts you to appoint you. He told me the Judge was aware of the situation and was planning to appoint another attorney. And just this past week I contacted the Judge's secretary, he was out of town, and she set up an appointment for me Monday, as a matter of fact.

Q. Monday of?

A. Of next week.

Q. Of next week. All right. Now, would you tell me what your duties are pursuant to your appointment under 53 pont 1 dash 40? What do you see your role as?

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Q. When you file a motion on behalf of one client, isn't the next step you notice that for hearing in order to get it decided? Isn't that standard procedure in the Circuit Court of the State of Virginia?

A. Yes.

Q. Okay. Do you do that on behalf of the inmates that you represent at the Penitentiary when you file a motion on their behalf?

A. Well, I have not filed any such motion. But at this point I would say that my role is not to get the hearing date for the inmate.

Q. What would you do when you filed the motion for appointment of Counsel to see to it that the Judge ruled on that motion?

THE COURT: You mean what would you do to encourage the Judge to make a timely —

Q. I stand corrected.

A. Are you assuming that the Motion —
THE COURT: Do you feel precluded to ask the Judge for a hearing so that you can explain the situation to him and ask him for appointment of Counsel? That is what he wants to know.

A. No. I think when you talk about appointing counsel,

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no, I wouldn't feel precluded.

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Q. You know that it was his idea? How do you know that? He contacted you, is that right?

A. He told me so. In fact, I had talked to him several months before this, and he told me he was planning it. I always had been — he asked me to serve on that committee. So I have had contact with him.

Q. What is —

A. Mr. Gorman, yes, he has provided me with a lot of information about that and has gotten me thinking about what my role should be, yes.

Q. As Court Appointed Attorney?

A. But I would in no way say that he tells me what to do, because I am in an adversarial relationship to him for the most part.

Q. He was at the meeting that took place, was he not?

A. He was one of the speakers. I think he did speak informally to some of us about our role.

Q. What other suggestions did Mr. Gorman make to you about your role as Court Appointed Attorney?

A. Well, I am not sure what exactly — what I said already. But I think his suggestion was that we should do everything on behalf of that inmate, except appear as counsel of record, including actually drafting and typing the

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petition for the inmate.

Q. Did he tell you what the basis of his interpretation of the appointment was, why he thought that is what you should be doing?

A. Again he referred to the statute and case law.

Q. Okay. Could we show the witness the Defendants' Exhibit Book, please. Could you turn to Exhibit 4, please. Excuse me, 3, I am sorry. And turn to the last page. Well, turn to the first page at the beginning.

A. All right.

Q. This is an I. O. P. Number 42 of the Penitentiary, is that correct?

A. Yes.

Q. Have you ever seen this document before?

A. No, I have not.

Q. Okay. Would you turn to the last page of that document, please. It is entitled Attachment C.

If you could read that first paragraph to yourself, please.

Now, if you look at the third sentence where it makes reference to your being authorized to provide legal counsel, parenthesis, advice, is that consistent with what Mr. Blazek had originally told you the scope of your duties were at the Penitentiary?

A. It is consistent, yes.

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Q. To provide advice?

A. Right.

Q. That is not consistent with what Mr. Gorman in fact told you the scope of your duties were, is that right?

A. It is true that what Mr. Blazek told me my duties were is not consistent with the information I am receiving now.

Q. How do you perceive this statute? Does that reinforce? Is that consistent with what Mr. Blazek told you or is it consistent with what Mr. Gorman told you about the scope of your duties?

A. Well, are you asking me to interpret what the meaning of putting advice in parenthesis is?

Q. That is what I am asking you.

A. I would think, I would assume that the point of that is to try to limit the work I am doing.

Q. Which is consistent with Mr. Blazek's interpretation and not Gorman's, isn't that right?

A. I would say so.

Q. Thank you.

It is your understanding, is it not, that I. O. P. of the institution govern the operation of that institution.

A. Yes.

Q. Okay. Now, have you ever been informed that there was an inmate in the death house at the Penitentiary who needed to see you?

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A. No.

Q. Ever been informed that there was an inmate in the death house by an inmate, period?

A. No, I have not.

Q. Have you ever been aware of an inmate while you have been Court Appointed Attorney being in the death house at the Penitentiary?

A. No.

Q. What is the most time that you have ever spent on behalf of one attributable to the case of one inmate?

A. Well, at this point I would say the most I spent on a case would be three or four hours, but I am not finished with that.

Q. If you were asked to see an inmate in A. Basement — do you know when in relation to an inmate's execution he is transferred to A. Basement at the Penitentiary?

A. I understand that it is 15 days.

Q. Prior to the execution?

A. Correct.

Q. All right. If you were asked at that point when you first arrived to assist the inmate in A. Basement, what would you do?

You are told he didn't have an Attorney.

A. The first thing I would do is to go see him.

Q. What would you attempt to find out from him?

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A. As much particulars as he can tell me about the case. I would, of course I would get copies of, if not the actual papers, that he had. I mean, as I tell every inmate, bring your papers when you come talk with me, and they all understand what that means.

Q. Do you understand that inmates in the death house come to talk to you when you show up?

A. Well, I guess I would have to go see them, right. I mean, It is like —

Q. He will have whatever papers he has with him, and that is it, he can't go get them for you somewhere else?

A. Right.

Q. So he would show you whatever papers you had?

A. Right.

Q. That is what you would ask to see? What else would you do?

A. Well, I think — we are talking 15 days from execution, I think I would have to contact Judge Nance immediately and try to get him to appoint an attorney to help me.

Q. What if Judge Nance is on vacation?

A. Then I would talk to one of the other Judges.

Q. Do you have — have they told you what their policy would be in such instances?

A. No, they have not.

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Q. Let's say that the Judge says, well, let's say the Judge says, sorry, got a one hour time limit. Now what do you do?

A. One hour time limit?

Q. Yes, you can — let's say five hours. You can put in five hours on this inmate's case. What are you going to do next?

A. Well, I think I am going to have to figure out what type of motion to file to get an attorney appointed quickly.

Q. What motion would that be?

A. Failing that, I think I would have to take it on a Pro Bon basis. Ethically I am the only one standing between that inmate and execution, so I think at that point it is up to me. Until

I am relieved.

Q. You think you have an ethical obligation to somebody just because — to every inmate that is in the Penitentiary?

A. I think in that particular situation. Again, of course, I was never faced with it, but I would feel that I was the only one at that point. Until I had someone else committed, I would have to stay committed.

Q. What would you file in order to try to get counsel appointed?

A. Well, I think I would have to get together a habeas petition and a motion for appointment of counsel depending on, I guess it all depends on what stage we are in, of

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course.

Q. Well, we are in the stage that he is facing execution and no habeas has been filed, okay?

A. I stand on my previous answer.

Q. All right. You would answer, you filed those. Are there any other documents that you would prepare at that time?

A. At this point I don't know. I don't have the expertise to be able to answer that.

Q. What do you know about death penalty procedure?

A. Very little.

Q. What do you know about death penalty law, substantive law?

A. Again, very little. I would have to educate myself.

Q. You are not going to have much time to that, are you?

A. That is right.

Q. Now, what are you going to do if no counsel is not appointed? Well, let me back up on that. Have you ever filed a motion for appointment of counsel on behalf of an inmate in this role?

A. I don't believe I have, because in the time I have been working over there I have been — I understand Mr. Blazek is still currently working over there, apparently I am the only one doing anything right now.

And I have been catching up on the back log. A lot of

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seeing of inmates and determining which cases are emergencies. I have taken care of those first, as any attorney would, and put out the fires first.

And I have talked to several inmates and gathered a lot of transcripts, but I have not yet filed a habeas for several reasons. One, like I say, I do the emergencies first. I have my other practice, and I know that you have to be careful when you file a habeas to raise all of the claims that you make, or you may lose some of the claims. So it is not something that you do quickly. But of course, we are talking about a death row case. I am not going to let it sit. That is one of things they have been talking about.

Q. Okay. What is your understanding of the point in the habeas procedure in state court at which counsel may or may not be appointed?

A. It is my understanding under Virginia law that counsel is to be appointed once an inmate is given a plenary hearing.

Q. Evidentiary hearing?

A. Yes.

Q. So —

A. I think in my general experience, I would say that Judges would treat a death case differently.

Q. Your experience being what?

A. In my general practice.

Q. You have had a death penalty case?

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A. No.

Q. So what is the conclusion based on that you would treat it differently?

A. Just on my experience in other cases, not on a death penalty case.

Q. What other cases have they treated differently?

THE COURT: Is it fair to say, son, what you are saying is it is your perception?

A. That is fair to say, yes.

THE COURT: Not based on any personal experience.

A. No, No. All right. Poor choice of words on my part. I would say my perception.

THE COURT: Move along.

Q. Yes, sir.

If it was necessary for you to obtain a stay in a distant County, stay of that execution, what would you do?

A. In a distant County?

Q. Go back to Wise?

A. Find out what their procedures are.

THE COURT: We are going to put you on an airplane again. He wants to know would you pay 3 hundred dollars to fly out there.

A. Again, I feel like if I am the only one, I feel like I would have to. I am not saying I would be happy about it. But I think that is basically one of those, you just say

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that is one of the things that happens to you.

Q. Do you have any idea how much work is involved in a death penalty case?

A. I can only guess based on what I have read.

Q. Okay. What is your understanding of the kind of time commitment that is involved?

A. Well, I am sure it would take hundreds of hours. I understand from talking with Mr. Snook that I believe in one case he had four days where he was not able to sleep because he was up all night. I understand it is a tremendous amount of time.

Q. Are you in a position in terms of your other practice and other commitments that you have to do that under those circumstances?

A. I think it would create chaos, no question.

Q. Are you prepared to do it in more than one case at one time?

A. Twice as bad.

Q. In all candor, wouldn't it in fact be impossible?

A. No. Well, you are putting me in a position of saying that I would drop the ball on a case.

Q. Putting you in the position of digging deep into your sole and deciding what the truth is and not what the Bar tells you

that you have to do. Could you do it?

Two cases at one time. Realistically, can you do

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That?

A. I would say it would be next to impossible, yes.

Q. I have no further questions.

THE COURT: Any redirect?

Mr. Gorman: A little.

Redirect Examination

By Mr. Gorman:

Q. I believe you mentioned that you have read the Peterson v. Davis case and that this forms part of the basis of your understanding of what your duties are, is that correct?

A. That is right.

Q. All right. You were shown an I. O. P. from the Penitentiary. I believe that you told Mr. Zerk that this I. O. P. governed the operation of the Penitentiary?

A. Right.

Q. Doesn't govern your practice, though, does it?

A. Certainly the case law would take precedent.

Q. Is advice giving, giving advice to inmates a part of your job?

A. Yes.

TESTIMONY OF JOSEPH R. KILLEEN
July 11, 1986

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(Witness Sworn)
Joseph R. Killeen testified as follows:
Direct Examination

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When we put this particular package out, this was issued through the payroll, to every staff person, so they could all get it at once. And if I remember correctly, we put it out to every building, not only death row, but the entire inmate population.

Q. Page two of the exhibit talks about legal issues and what is available to inmates. Was there any means of notifying inmates prior to this document as to what resources were available to them as far as assistance?

A. They had it in I. O. P. 12, which was a document, I can't tell you when it first originated, but it was there long before I came in '82. But it has always been there as far as I know.

Q. All right, sir.

Now, turning to exhibit 7, can you tell me what that is, what is it used for?

A. This is a legal request that inmates use for particular services. For example, law library visits, photocopying, notary services. This is a revised, I think this is the latest revision, April 29 of '86 of this year.

Q. All right, sir. Part of a blanks on that form relate to visiting the law library. Can you explain to the court how inmates get to the law library and how often they can use the law library, specifically addressing your attention to

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death row inmates?

A. Well, we use the rule of thumb, I think it is the Virginia Circuit Court case where it required at least two and a half hours, which is kind of traditionally like an inmate half day.

We always use a guideline the A. C. L. U. M. C. C. consent degree where we guarantee a half day.

In our hourly set up to get to building one the death row inmates there, or other buildings there, we have set up a weekly schedule, half days at particular references, building one, death row, et cetera. And we have two days set up per week for death row inmates to visit the main law library.

Q. What days are those?

A. Tuesday and Thursday? I would have to look.

THE COURT: It is not material is it?

Q. No, sir. Let me go on the next question.

But in any event are they allowed two half days a week?

A. Two half days, yes.

Q. I am going to ask you now if you would, to look to defendants' exhibit number 9. Which apparently is a law library inventory for the -- Do you have that?

A. Yes.

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Q. So is it your testimony that it is not throughout, correct, that you have to request permission to go to the library approximately two weeks in advance? That would not be correct statement?

A. I have never observed that rule myself. Especially for death row, no.

Q. Now, Mr. Killen, when death row inmates go to the library, are they allowed to browse through the stacks?

A. No.

Q. I would like to refer you back to defendants, exhibit 18.

The bottom left-hand picture on that exhibit. Isn't it a fact, Mr. Killen, that death row inmates are locked in one of those cages during their time at the library.

A. Yes.

Q. And they have to request specific books from a library inmate if such inmate is available, for these books to be brought?

A. Or the law library officer, one of the two.

Q. Or the law library officer?

THE COURT: How about the fellow that doesn't know anything about legal research? He can't go out in the library and hit and miss, as I would think somebody that

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didn't know anything about legal research might be inclined to do, you can't do that?

A. No, sir.

THE COURT: He has to ask for 387 Fed. 2D and that sort of thing.

A. Or he may ask for specific books that will help shepardize the case, something that he can use for referencing to try to find the case.

THE COURT: Is there anything there, Mr. Killen, that would help a novice, somebody who has no knowledge of the law except that he has violated it or at least been convicted of it?

A. There are certain book there, too, that help guide an inmate. I am not sure of the title. One is one that A. C. L. U. people have put out.

THE COURT: How does he know about it if he can't look around the library?

A. We can tell him about it, if he is trying to find these things. Another one is called a Layman's View or something like that. But they are told about it. And most of these fellows on death row have had access to these things many, many times.

THE COURT: All right.

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Q. Is it also true, Mr. Killen, that warden Baer refused to let Joe train clerks to use the law library annex?

A. I am not sure of that. But I would assume he probably wouldn't have. But I don't know that.

THE COURT: Are the librarians in the main library, inmates, guards, whoever, they are trained in legal research so they help an inmate research?

A. Some can in general sheppardize and research, but to get to the nitty gritty of death row cases or something, I don't

know. I am not qualified to say.

THE COURT: You don't know.

A. I don't know.

THE COURT: You don't know any special training they are getting?

A. As I say, we relied on some training we were able to obtain from the A. G.'s office. They would make themselves available upon call.

THE COURT: I see.

TESTIMONY OF JAMES KULP
July 11, 1986

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(Witness sworn.)
James Kulp testified as follows.
Direct examination

By Mr. Harris:

- Q. What is your name, sir?
A. James Kulp.
Q. Your occupation?
A. Senior Assistant Attorney General with the Commonwealth of Virginia.
Q. You are an attorney?

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- A. That is correct.
Q. Where did you obtain —
THE COURT: No, he is a plumber.
A. Washington Lee University.
Q. How long have you been a lawyer?
A. 21 years.
Q. What bars are you licensed to practice before?
A. United States Supreme Court, the Fourth Circuit Court of Appeals, District Court in the Eastern and Western District of Virginia, Supreme Court of Virginia, all the Courts in the Commonwealth of Virginia.
Q. You are presently employed as a Senior Assistant Attorney General?
A. That is correct.
Q. Before that, sir, what was your employment?
A. I was in private practice in Richmond with a law firm for a period of about five years.
Q. During your time at the Attorney General's Office what type of activities have you conducted?
A. Well, basically been involved in the Criminal Law Enforcement Section since June of 1970. I have been involved in Habeas Corpus Litigation, direct appeals and all in the Supreme

Court of Virginia. And since the new Capital Punishment Law was enacted in Virginia in 1977, I have been coordinator of all Capital Litigation in the Commonwealth.

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- Q. Can you estimate how many Habeas Corpus cases you have handled in that time?
A. There have been, they have been in the hundreds, I couldn't estimate the number.
Q. In what courts have you conducted litigation in post conviction challenges for death sentences?
A. All courts, both State and Federal, United States Supreme Court, Fourth Circuit, all District Courts and all State Courts.
Q. Could you approximate how many cases involving a death sentence—

THE COURT: Now, If you are trying to make him an expert, do you want to cross-examine on expertise?

Mr. Sasser: We object to using him as an expert. No matter what it is, he is counsel. Your Honor offered Mr. Landers a chance to get on the stand and testify, which he declined, but I don't see if we let — If we put a lawyer on the stand to give an expert opinion, his side should win.

THE COURT: I don't think that is the opinion he is going to give. That is the view he has. But I am not going to permit him to — the objection is overruled. Go ahead.

What are you trying to show by Mr. Kulp? Tell me.

Mr. Harris: Mr. Kulp will establish relationship between the Attorney General's Office and Commonwealth's Attorneys as far as conduct of litigation in capital cases.

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He will establish policies of the Attorney General's Office regarding capital litigation cases, and particularly contacts he may have had in connection with attorneys in capital litigation cases.

THE COURT: Well, go ahead, but make it succinct.

- Q. Who is responsible for prosecuting a criminal case involving a death sentence?

A. Well, the original prosecution is the Commonwealth's Attorney in the local jurisdiction.

THE COURT: You don't get into it, do you, until after there has been a conviction?

A. That is correct, your Honor, sir. The first thing we would have other than a prosecutor may call us, we may give him some—

THE COURT: You are in when the appeal is taken, so you get in to every capital conviction since, what is it, '77.

A. '77, yes, sir.

THE COURT: Right. You have been in charge of —

A. I have been in charge of.

THE COURT: Defense, of all of those?

A. Yes, sir.

THE COURT: That is arguing the case before the Supreme Court of Virginia and arguing against cert.?

A. Yes, sir.

THE COURT: Okay.

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By Mr. Harris:

Q. Who is responsible for setting an execution date or asking the Circuit Court to set a date in the capital case?

A. The local prosecutor.

Q. Is there any contact between the Attorney General's Office and local prosecutor in requesting the date?

A. Well, we have occasion to have contact with them. For example, when the person is originally tried, if he is convicted with our office whatsoever. Or, if they did call us, we would tell them to set it sometimes three or four months down the road because we know that once the record is filed with the Supreme Court of Virginia they get an automatic stay.

If we have a case where certiorari or something has been denied, and the prosecutor wants to set a date, if we have had contact with anyone who has indicated they are going to file some action on behalf of the inmate, we recommend they do not seek an execution date. If they insist on doing so, we would ask them to set one at least 30 days away.

Q. If an execution date has been set and you are contacted

by an attorney who indicates he wants to represent an inmate filing a post conviction challenge, have you had any opportunity to deal with that as far as establishing a time to file a petition?

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A. Yes. Generally when we find out if certiorari has been denied we generally get in touch with the attorney who represented the inmate on certiorari. We ask if he is going to continue his representation. Up until recently it has been my recollection that until recently the attorneys who did represent them on certiorari continued in the State Habeas and Federal Habeas thereafter.

Q. Is that assuming that the attorney on cert. was not the trial attorney?

A. That is correct.

Then we would ask them if they intend to continue, and if they tell us they do, we would ask them if they can file a petition in the State Circuit Court within 30 days.

And the general response is that they have been unable to do that and we tell them that if they would agree to do that we will call the local prosecutor and ask him not to fix a new date.

Q. Where a date has been set, have you had any occasion to, for example, join in a stay?

A. Yes, I mean if there is a date set and they file a motion for a stay, we join in. And that is when we are talking about going through the system the first time.

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Q. Were you aware of the statement or the position of the Federal Courts that they would appoint counsel in exceptional circumstance?

A. I you knew that as a general rule. I had not read that particular case.

Q. I would direct your attention down on this outline under State Habeas Corpus proceedings, Section C.

A. Yes, sir.

Q. It states that the policy of the office of the Attorney General is they will not oppose any motion for appointment of

counsel by a pro se death row inmate:

A. That is correct.

Q. Is that an accurate statement?

A. That is a statement of policy of our office, Yes.

THE COURT: Has it always been that way?

A. Yes, sir.

Q. Why is that the position of the Attorney General's office?

A. Well, basically we want to see the inmate have an attorney at State Habeas for reasons of economy and efficiency.

When you have a death case, we recognize that it is going to be prolonged litigation and we want to see all

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matters that the inmate or the petitioner wants to raise be raised at one proceeding, and we can deal more efficiently with an attorney. And we prefer that from an economy standpoint we don't have to have more than one proceeding.

Q. We have heard testimony in this case from Mrs. Marie Deans, are you aware of her activities regarding death row inmates?

A. Yes, I am.

Q. To your knowledge what does she do?

A. Well, I have had any number of conversations with Miss Deans. As I understand, she works with the individuals on death row to assist them in obtaining counsel, that she also apparently works as a paralegal from time to time, I guess with some of the people who have decided to take cases.

Q. Have you spoken with Miss Deans regarding her effort to locate volunteer attorneys for death row inmates?

A. We have any number of discussions, I have tried to offer suggestions. For example, I indicated to her that I didn't feel that it was necessary that she run around the country side and try to secure attorneys when we had attorneys available at the institutions.

I have also suggested to her that — she didn't seem to be interested in doing that, and I suggested, well, why not seek attorneys who would simply draft the original petition for State Habeas and have that given to the inmate

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and have the inmate file it with the court. Not the attorney, but the inmate.

And then seek for appointment of counsel.

And apparently she hasn't been interested in doing that.

Q. Have attorneys who have represented a death row inmate at some stage contacted you and advised you they would be leaving a case?

A. Not that I am aware of.

THE COURT: Do you join in a motion for appointment of counsel?

A. If the inmate himself had filed, we would, yes, sir.

THE COURT: Only when he has counsel of record that you —

A. That is when we have objected, yes, sir.

THE COURT: Why?

A. Well, the reason we object to that is because we don't believe that the inmate has the right to name his own attorney.

It takes the discretion away from the court. Additionally I think that normally the court would appoint someone locally, which would allow better flexibility for the court in scheduling hearings than someone who may be far away from the court.

Q. If I could direct your attention to the defendants'

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Exhibit 14.

A. I have it, yes.

Q. Are you familiar with this letter?

A. Yes, I am.

Q. Do you know who Vivian Burger is?

A. I only have spoken with her on the telephone.

Q. According to this letter, you had advised her of the availability of the attorney at the Mecklenburg Correctional Center that he was available to assist inmates if she could not locate another attorney?

A. That is correct.

Q. Defendants' Exhibit 15 is a response from Mrs. Burger?

A. Yes, I am familiar with that.

Q. Defendants' Exhibit 16 is a further letter from you, I take it?

A. Yes, I am familiar with that.

Q. If there was any question about whether or not Mrs. Burger was advised of the availability of unit attorneys, could you please refer to the third paragraph of that letter?

A. Yes, I have that.

Q. Would you please read that?

A. In any event, I now advise you that whether Mr. Wise is in prison at Powhatan, Mecklenburg or any other Correctional Facility in Virginia, that the institutional attorney appointed by the respective court to represent

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inmates at the specific institution is available to assist Mr. Wise in filing a petition for Habeas Corpus.

I will be happy to supply you with the name, telephone number and address of any institutional attorney you may desire.

Q. Mr. Kulp, would an inmate have to file a petition for Writ of Habeas Corpus already drafted and filed with the Circuit Court in order for the office of the Attorney General to agree to the appointment of counsel?

A. No. If he wrote a letter asking the court to appoint counsel to assist him in filing a petition, we would ask the court to appoint counsel.

Q. Regarding possibility of amendments to a petition for Writ of Habeas Corpus, is there any position of the office of the Attorney General on allowing amendments or not objecting to amendments or petitions filed?

A. To my knowledge we have not objected to any amendments, of petitions, and I think our policy is that we would not object to amendments to petitions except perhaps on the day of a hearing, a scheduled hearing or something like that when they are trying to raise new matters for the first time in the hearing. We may or may not object to it.

But that would only be because unless the court would give us a continuance perhaps to be able to respond to that particular allegation.

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Q. Are you aware of whether or not any inmate has ever filed pro se in the Circuit Court asking to have counsel appointed?

A. Well, not to my knowledge. Of course, there may have been correspondence with courts with which I am not aware, but nothing I am aware of has ever been copied to our office.

Q. No further questions, your Honor.

Cross-examination

By Mr. Sasser:

Q. Mr. Kulp, you are the senior assistant Attorney General?

A. One of them, yes, sir.

Q. That is the same title as Mr. Horsley over there at counsel table?

A. That is correct.

Q. You are head of the Habeas Section?

A. No.

Q. Not head of Habeas section?

A. No.

Q. What do you do in the Habeas Section then?

A. I handle Habeas Corpus cases assigned to me.

Q. Have you ever been head of the Habeas Section?

A. Yes, I have.

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I have been ahead of the entire criminal division at one time.

Q. Are you the most senior member of the Attorney General's staff working on habeas cases, an death cases?

A. I would say so, yes, sir.

Q. Mr. Harris here is a member of the habeas section, is that correct?

A. That is correct.

Q. You are a supervising attorney for Mr. Harris?
 A. Yes.
 Q. When Mr. Harris asked Jim Kulp to be a witness did he consult with his boss, Jim Kulp?
 A. Consult with me?
 Q. Yes, as his senior.
 A. No, he did not.
 Q. Have you ever talked to any of those folks at this table about this case?
 A. Oh, yes.
 Q. Have you ever reviewed any of the pleadings in this case?
 A. I think all the pleadings in this case have been filed before I reviewed them. I have seen them since. Normally in the capital cases themselves I have actually reviewed them before they have been filed.
 Q. Did you give these folks advice about this case?

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A. I am sure I have. But, I haven't taken that much of a role in this particular case.
 Q. Do you remember meeting back in November in the Attorney General's office where I was there?
 A. Oh, yes.
 Q. You were participating in that meeting?
 A. Correct.
 Q. Appearing on behalf of the defendant's in this lawsuit?
 A. I am.
 Q. You were then appearing on behalf of the defendants in this lawsuit, is that correct?
 A. Well, there weren't any defendants in the lawsuit when I met with you.
 Q. Well, Mr. Giarratano filed a suit back in July, had he not?
 A. I assume probably he did maybe.
 Q. There were defendants then, weren't there?
 A. Well, I guess so.
 Q. And you were representing them, were you not?
 A. I assume so, yes.

Q. On direct you were talking about lawyers leaving cases. Is it your understanding that lawyers are appointed in death cases to handle the trial and then they also handle the appeal of that case?

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A. That is correct.
 Q. That is when the Commonwealth quits paying them to handle that case, is that correct?
 A. As far as I know.
 Q. Some of the lawyers handle the cases on up through certiorari?
 A. Right.
 Q. And not many of them go on in to State Habeas Corpus proceeding?
 A. We don't frankly want them to go into State Habeas.
 Q. Not many do?
 A. There is always going to a claim of ineffective assistance. We prefer they not, and so if they ask us we would say that we think they ought to get out because we are not going to go through the case more than one time.
 Q. You actually prefer another lawyer coming in so he can allege a claim of ineffective assistance against the trial lawyer?
 A. That is correct.
 Q. Now, after certiorari — let me refer you back to exhibit 19, please, sir. By the way, do you know who prepared exhibit 19?
 A. I think maybe it was Mr. Gorman, but I am not certain.
 Q. Can we stipulate, Mr. Gorman, whether that was prepared by counsel?

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THE COURT: Not in my presence. Don't ask counsel to stipulate anything. They may not want to. And it puts him in an awkward position.

Q. All right.

THE COURT: It came out of the Attorney General's office as far as you know?

A. Yes, sir, it was prepared in our office.
 Q. You have seen it before?
 A. Yes, I have.
 Q. And exhibit 19 before you purports to list counsel and legal resources available to indigent and death row inmates, correct?
 A. That is right.
 Q. I think you testified on direct that it is the position of the Attorney General's office not to object to a motion for appointment of counsel by indigent death row inmates?
 A. If the indigent files himself, that is correct.
 Q. Now, I have heard it — did you also say the Attorney General's office would join in this motion?
 A. As far as I know he would, yes.
 Q. You never done that before, have you?
 A. I am not aware that it has occurred.
 Q. You would actually join in the motion to have counsel appointed for him?

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A. If he asked for it, yes.
 Q. If he asked for it first?
 A. Yes.
 Q. Other than, let me refer you to exhibit 19 to section B. roman numeral one letter C. Do you see where it says Attorney General's office policy?
 A. Yes.
 Q. Will not oppose any motion for appointment of counsel by pro se death row inmate?
 That doesn't say you will join in the motion, does it?
 A. No.
 Q. This was a document prepared by the A.G.'s office in preparation for this lawsuit, is that correct?
 A. That is correct.
 Q. Now, just because the Attorney General's office doesn't oppose a motion for appointment of counsel, that doesn't mean the Circuit Court has to grant it, does it?
 A. No.
 Q. Just because you join in the motion doesn't mean it has

to grant it, does it?

A. Of course, I say only if we knew about it could we take any position.
 Q. And even if you didn't take any position, the Commonwealth's Attorney could still oppose the motion, could he not?

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A. I would doubt that, because the Commonwealth's Attorney would have no standing in the case at that point.
 Q. You are not aware of any point where the Commonwealth's Attorney has opposed a motion for appointment of counsel?
 A. Not that I am aware of.
 Q. Are you aware of the Earl Washington case?
 A. I know some things about the Earl Washington case.
 Q. Do you know counsel was denied at the execution, the setting of the execution date, do you not?
 A. Beg pardon?
 Q. Do you know whether counsel was denied at the time of the execution date was set?
 A. I have no independent knowledge of that.
 Q. No recollection.
 Are you familiar with the Stafford case?
 A. Yes.
 Q. Charles Stafford case?
 A. Yes.
 Q. Do you know whether the Commonwealth's Attorney for this county opposed the appointment of Mr. Dohnal to receive costs to represent Mr. Stamford in post conviction proceedings?
 A. No, I am not aware.
 Q. You are not aware of that either?

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A. No.
 Q. After a petition for State habeas corpus gets filed, your office usually moves to dismiss, is that correct? You frequently

move to dismiss?

A. No. I don't think that is —

Q. More than half the time after certiorary has been denied, — after certiorari has been denied?

A. On what level?

Q. And State — first time, first time through?

A. Talking about from direct appeal?

Q. On direct appeal there is a State petition for Habeas Corpus, the very first one filed. You sometimes move to dismiss that?

A. Sometimes.

Q. Frequently move to dismiss it?

A. Well, we frequently move to dismiss all claims that either have been raised before or could have been raised before.

Q. All right. In this motion to dismiss there is frequently oral argument, is there not?

A. Yes.

I think we have only had several cases where we have actually had a motion to dismiss filed that would dismiss the entire suit.

Q. But there have been?

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A. Yes, there have been.

Q. And that would dismiss the entire suit before any plenary hearing, is that correct?

A. That is correct.

Q. Now, Darnel V. Peyton is interpreted by the Attorney General to require appointment of attorneys of counsel at plenary hearings, is that correct?

A. That is correct.

Q. There is not a normal Attorney General's opinion on that, is there?

A. Not that I am aware. I think the case law is clear.

Q. The position of a Government office was taken in this lawsuit?

A. That is correct.

Q. Now, Darnel V. Peyton never would come in to play if the motion to dismiss was granted before the plenary hearing, is

that correct?

A. That is right.

Q. After a plenary hearing, whichever side loses in a death case usually petitions the Virginia Supreme Court for appeal, is that correct?

A. That is right.

Q. Now, the way I understand that this system works, the petitioner argues before 3 judges of the State Supreme Court?

A. That is right.

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THE COURT: Is that really so?

Q. The petitioner —

THE COURT: I want to find out.

A. Well, not the petitioner, but his attorney.

THE COURT: I know. But is it always before three judges?

A. Yes, sir, as far as I know always before three judges.

Q. The appointment of counsel under Darnel V. Peyton for a plenary hearing doesn't extend to the petition for appeal does it?

A. No Cooper v. Haus might.

Q. Before the actual argument in the appeal?

A. Yes.

Q. Do you know whether before Cooper v. Haus. would appoint the same counsel that represented the inmate in plenary hearing?

A. I would assume they probably would.

Q. Only assume, no way of guaranteeing that is there, sir?

A. No.

Q. Now, these habeas petitions, you say it is the policy of your office not to oppose amendment, is that correct?

A. Correct.

Q. Did you all not object to the amendment of petition, Federal petition in Giarratano's case?

A. Oh, yes, but I think — I don't remember all the

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specifics about that, but my recollection is that we objected to it because they were trying to raise new grounds or something of the nature, which might have some aspect of the case.

I think maybe after a year or so or something of that nature. I don't remember all the specifics.

Q. Now, you say the execution date was set and a motion was filed for a stay, the Attorney General's office will join in that motion, is that correct?

A. Depends on what stage you are talking about.

Q. Right after certiorari has been denied after direct appeal?

A. Yes.

If we have an indication that they are going to file something.

Now, we have a case, for example, like Depollo where the inmate has decided he is going to forego his rights, we are clearly not going to request any stay.

Q. Then, now, if there is an inmate that somehow makes his way to the death house here in Richmond and still doesn't have counsel, do you do any motions for stay on his behalf?

A. No. We have no right to intervene on behalf of the inmate.

Now, I would say this, though. If we obtained any information from anyone that we could determine was in fact

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representing the wishes of the inmate, and that he in fact wanted to file and an execution date was fixed, you know, say tomorrow or the next day or something like that, that, yes, we would.

One, we would refer them to go to the court to ask for a stay, but we would not oppose that as long as we are convinced that the person who is making that representation in fact represents the wishes of the inmate.

I mean, because we would get back to the Depolo situation. Depolo fired his attorneys and said he did not want to pursue, but yet attorneys came in on his behalf. So, I mean, we certainly wouldn't join in in a situation like that.

Q. I am talking about a situation where the man was just sitting there and doesn't have a lawyer, about to be executed, what do you do?

A. If we had any information from him or anyone acting on his behalf —

THE COURT: You would do what?

A. We would ask for a stay.

THE COURT: The State would ask.

A. Well, we would ask him to file a written statement with a court to ask for a stay to say he wants to file habeas or what. I am talking about initially, Judge, through the system one time.

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THE COURT: I know. Then you would affirmatively join in the motion?

A. Yes, we would.

THE COURT: But as I understand your testimony, and I I hope I understand it correctly, the short answer to Mr. Sasser is, you all don't — I am not critical of it, you don't affirmatively do anything.

A. No, sir. Well, I will take it back, your Honor.

I don't think that that has been true in the past. When I say we don't do anything affirmatively, because for example in the Washington case I was on the phone with Marie Deans, who was assuring me they were going to have someone to file, and I kept saying, let's have them file, please have them file so we don't get down to the last minute. So I think although we can't go to court on his behalf, I think we were trying to tell them, look, do something. That we are not going to oppose a stay.

Q. You did something in the Earl Washington case?

A. No, I said except talking to Marie Deans and trying to get her, she kept advising me that somebody was going to file on his behalf.

Q. Did she tell you who?

A. No, she did not.

Q. You are absolutely convinced someone was going to file on his behalf?

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A. No question in my mind somebody was going to file.

Q. If somebody had not, what would have happened say two days before the execution? Nobody filed yet. What were you all going to do?

A. If he had made any indication to anyone that he wanted to file a petition, we would have advised the people at the penitentiary to have him write it out in a letter and send it down to Judge Merhige, or anybody else.

Q. Would you have sent someone from your office to talk to him and ask?

A. No.

Q. You would have sat and waited for him to come to you?

A. I don't think we have any obligation or any way we can go in and represent the inmate.

Q. If you didn't hear from Mr. Washington, you are were going execute him whether he had a lawyer or not, isn't that correct?

A. The order would have been carried out I am sure.

Q. The order of execution?

A. That is correct.

Because as far as we would have known, we would have had no indication that he would have been any different than Mr. Depolo.

Q. You would have had no indication that he wanted to live?

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A. Unless we had that indication. In other words, if you are saying that he sits there and says nothing, then there is nothing for us to do. If he indicates, said if he indicates that he wants to file, then we would advise the people at the Department to have him put that in writing and file it with the court.

THE COURT: That is enough. That is enough. I have heard all about it. Come on.

Are you conscious of the fact, Mr. Kulp, that there is difficulty getting competent counsel to handle these death, post

conviction death cases?

A. Yes, sir. And I think if I might say so, your Honor, I think the reason is, I mean other than it is obviously a mental strain for any attorney.

THE COURT: It is a different type case.

A. It is a different type case, but I think that the main complaint that I have heard attorneys indicating is that the commitment of time involved. And that is the reason that I suggested to Mrs. Deans to have the attorneys that she had been soliciting simply draft up and give to the inmate the initial petition, and they wouldn't be signing on for anything at all other than that, you know, small portion of the time.

THE COURT: One recognized it, there is a difficult time getting counsel.

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A. Yes, sir.

THE COURT: Are you sufficiently familiar with the professional capability, I want to be careful about this now, professional capability of these court appointed attorneys to handle petitions for cert. and — well, and other post conviction—

A. Talking about the unit attorneys?

THE COURT: Yes.

A. I am not familiar with all of them, although I have talked with Mr. Montgomery quit a bit and I feel relatively comfortable.

THE COURT: Mr. Montgomery aside, he has been at it 30 years or more.

A. I have not talked with the others, so I can't really say on that.

THE COURT: Your office of course has nothing to do with the selection that is done by the Circuit Judge.

A. That is right, sir.

By Mr. Sasser:

Q. You testified about exhibit 14. Look at defendants' Exhibit 14.

A. Yes.

Q. Do you see the last sentence of the second paragraph?

I advised you the attorney appointed to represent inmates of the Mecklenburg Correctional facility is available to assist

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Mr. Wise in the filing of his petition, do you see that?

A. That is correct.

Q. Do you know now that — well, strike that.

On April 17, '86 did you know whether Mr. Wise was at Mecklenburg?

A. I assumed he was. But I understood later that he was someplace else.

Q. You didn't know where he was?

A. No, I did not.

Q. He was actually at Powhatan?

A. I think I understood that.

Q. And Exhibit 16 you say, well, then the attorney at Powhatan can assist him, is that correct?

A. That is correct.

Q. And if he is —

A. Or any other place.

Q. Sent to Richmond the attorney there can help him?

A. Correct.

Q. Do you think where a man's attorney changes on wherever he happens to be is adequate representation for a death row case?

A. I think so.

Q. Have you ever represented a death row inmate?

A. No, I have not.

Q. You say you oppose the motions for volunteer counsel

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to be appointed. Now, tell me what the grounds were again.

A. The reason is in our view, in other words in the cases we are talking about, attorneys have filed petitions saying they are counsel. Under the rules of court they have appeared in court and they have taken on responsibility. When they ask for the appointment our view is that they are not entitled to name their own attorney.

Normally the court would appoint someone locally rather than someone from a distance away.

Q. And your office would rather the Circuit Court appoint someone locally?

A. That's correct.

Q. How many offices —

A. We prefer that, of course, the court can appoint whomever they want.

Q. And that is so that people don't have to travel a long way to the court?

A. Well, it is part that way and perhaps because we found, for example in situations with Mr. Snook, for example, who volunteered to get in four or five or six cases, we can't ever get a hearing date which is convenient with Mr. Snook because he is always playing one case off against another.

Q. How many offices does the Attorney General's office — How many branches? You are located in Richmond, aren't you?

A. We have one out in Southwest Virginia. We don't have

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attorneys that handle any of these cases out there.

Q. So you have to travel to whatever Circuit Court the Habeas petition is pending in, don't you?

A. That is correct.

Q. Could I have a moment?

THE COURT: Sure. You are about to lose your job, aren't you.

A. Yes, sir, couple weeks.

THE COURT: Come on.

Are you through?

Mr. Sasser: No, your Honor, I am not. I am not going to promise how many questions I have.

By Mr. Sasser:

Q. Death row inmate makes a motion for appointment of counsel to prepare and file a certiorari petition to the United States Supreme Court after his direct appeal has been exhausted. Would you oppose that motion?

A. Yes, we would.

- Q. What grounds?
- A. Because we believe that under most, Moffit, Ross that the Supreme Court has said he is not entitled to counsel at state expense.
- Q. You think he isn't entitled to, in State habeas proceeding?
- A. No, I don't think he is entitled to it necessarily.

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We would just prefer it, that is all. I don't think he has a mandatory right to it, no. We would simply join in requesting it, not as a matter of right, but as a matter of grace, because we want to handle the case one time.

- Q. And you wouldn't have that grace on certiorari petition?

A. Well, in most instances, certiorari has not been very successful for the death row inmates with the exception of delaying the case to go to some other court for six or eight months.

THE COURT: Is it your view that the institutional attorneys who are paid by the state ought not to assist —

A. No, sir.

THE COURT: — The petitioner in moving for cert.?

A. No, sir. I think they have that responsibility to do that because I think they have the responsibility to help assist them to go to any court wherever it is. I thought he was asking would we oppose appointment of counsel.

THE COURT: That is what he did ask you.

A. But not the inmate, not the institutional. We think they they are available to help to assist them to do that very thing. I mean, as one of the things.

Q. Now, what happens after a certiorari lawyer who has been doing this case for free tells you he is not able to handle it any more? What do you do?

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A. In the past I have been calling Marie Deans. Or she has called me, one or the other.

Q. What do you tell her?

A. I said, are we going to have somebody represent this person? And she says, yes, we are looking. And at times she has difficulty, but she has had people and we have dealt with them and we said if you can, if you will file, then we will ask the prosecutor not to set an execution date.

Q. When you say file, what do you mean?

A. We want them to file a petition. We ask them basically to file the petition in the State Circuit Court because we know that in most instances that is where they should start.

Q. The actual habeas petition, not just the motion for a stay or motion for appointment?

A. In most cases there is no reason to file a motion for stay at that point because there is no execution date.

Q. All right. Motion for a petition for habeas corpus is what you are talking about, not just a motion for appointment of counsel, is that correct?

A. Well, no. I said if the inmate filed, in other words — the way it has gone and the reason some of these things haven't come about is because they have had counsel. So, I mean, there is no reason to look for something else.

But, if Mrs. Deans calls and says we don't have any

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counsel, we can't get any counsel, and we are obviously not going to sit there from now to dooms day waiting on somebody to do something.

Q. You are going to give him an execution date?

A. Well, I would suggest to her several things: one, ask the inmate to write to the Circuit Court in which he was convicted and ask for the appointment of counsel to assist him in filing a petition for habeas.

If they sent us a copy of that, we would join in and ask the court to do that. We would always ask her to deal with the institutional attorneys, which we have suggested before. Have them assist him in drafting the petition.

Once he files the petition, and the inmate requests counsel be appointed, we would join in and ask for the appointment at that point.

Q. You haven't done that, though, have you?

A. The occasion has never arisen.
Q. I don't have any more questions.
THE COURT: Any redirect?
Mr. Harris: Briefly, your Honor.
Redirect Examination.

By Mr. Harris:

Q. Mr. Kulp, if an inmate filed prose in the United States Supreme Court seeking to have the United States Supreme Court appoint him counsel to prepare a cert.

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petition, would the state oppose that?

A. We would take no position at all. That is with the Federal Court, and not with the state.

Q. Based upon your knowledge of the unit attorneys, do you think that they are competent to file a motion for appointment of counsel?

A. I certainly have no reason not to believe so.

Q. Do you think they would be competent to file a habeas corpus petition raising some issues for a hearing with the leave to amend?

A. I think so.

Mr. Sasser: Objection.

THE COURT: Grounds?

Mr. Sasser: Said he didn't know, your Honor.

THE COURT: I am not sure he said that.

Mr. Sasser: He said he was not familiar with the institutional attorneys, no foundation.

THE COURT: Let him finish, because I have some questions to ask, too. Go ahead, Mr. Harris. You are in deep enough now.

Q. Do you have any reason to believe that someone —

A. I have no reason to believe an attorney appointed by a Circuit Court is not capable of filing an amendment petition to get the inmate into court.

THE COURT: I don't think that was the question. The

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question was the institutional attorneys.

A. I meant, that. That is who I meant. In other words, that the institutional attorneys appointed by the Circuit Court. I have no reason to believe they would not in fact be competent to file amendment petition to get the inmate into court.

THE COURT: Do you have any reason to believe that, not talking about individual ones, do you have any reason to believe that they are all competent to file a habeas corpus where they ought to put down every conceivable claim that they had?

A. I would, as I indicated, Judge, I don't know each of them individually.

THE COURT: That is the point.

A. Knowing what material is available to the institutional attorneys, I would see no reason they could not do that.

THE COURT: You spent a lot of time, almost spent as much time in this court as I have, would you agree with me that it would be very difficult for somebody fresh out of law school, just a year out of law school to handle a petition for — well, not cert., but a petition for habeas corpus in which you have to really do something timely because there has been an execution date has been set? Do you think that the average lawyer out of school a year or less, even two

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years or less, never handled anything like that, would be competent to do it? Isn't it a complicated procedure?

A. I think that would be, of course depending on the person, but as a general rule I would say it would be somewhat difficult. But as I indicated, knowing what I know about the materials which are available, I think — I mean we see them, Judge, even you know attorneys who are very experienced, we see the same issues over and over again, the same boiler plate pleadings.

THE COURT: And the same boiler plate answers.

A. That is correct. There is no question about it.

THE COURT: All right.

Mr. Harris: No further questions.

TESTIMONY OF MARIE DEANS

July 11, 1986

[Page 455]

Marie Deans testified further on her oath as follows:
Direct examination

By Mr. Landers

Q. Mrs. Deans, have you had any conversations with Mr. Kulp regarding Earl Washington?

A. Yes, I did.

Q. How many conversations have you had with Mr. Kulp about Earl Washington?

A. There were several. I don't remember the exact number.

Q. What did you say to Mr. Kulp in these conversations?

A. Mr. Kulp was calling to see if I had found an attorney for Earl Washington, and I was telling him that, no I had not found an attorney for Earl Washington.

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Q. Did you ever assure Mr. Kulp you would find and attorney for Earl Washington?

A. No, I can't do that.

Q. And you didn't

A. No, I did not.

Q. Did you tell Mr. Kulp that you were willing to find an attorney for Earl Washington?

A. Certainly.

Q. Did Mr. Kulp know that you were acting on Mr. Washington's behalf in trying to find an attorney?

A. Yes, he did.

Q. When did you first tell Mr. Kulp that you thought you had found an attorney for Earl Washington?

A. I never did tell Mr. Kulp that I thought I had found an attorney. I told him when Paul, Weiss said that I would do the papers. I told Mr. Kulp that the firm of Paul, Weiss had agreed to do papers for Mr. Washington. I still had no representative.

And no one to file for him.

Q. And when did you tell Mr. Kulp that Paul, Weiss had agreed to do Mr. Washington's papers? And if you can't remember the date, perhaps you could locate that with respect to when the papers for Mr. Washington, the habeas papers were filed.

A. Well, I do remember the four days that were put into the papers, so I would assume six to eight days before his

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date of execution.

Q. Now, are you assuming or are you recollecting Now?

A. I am recollecting to the best of my recollection.

Q. Mrs. Deans, have you ever spoken with Mr. Montgomery regarding Mr. Poyner?

A. Yes, I have.

Q. And what did you say to Mr. Montgomery about Mr. Poyner?

A. I told Mr. Montgomery -- well, first off I talked to Mr. Montgomery about the fact that we were having a great deal of difficulty finding Mr. Poyner an attorney. I called it Poyner one and Poyner two because it was so complicated.

And at the point when the Supreme Court agreed to take the out of time cert. we had like a week left. I sent every thing to Joe Giarratano, and I finally got Mr. Montgomery and told him that Joe was going to do the cert. petition, and I simply asked him to help Joe, to go over there and help Joe.

Q. What did Mr. Montgomery say to you, if anything?

A. Well, he said he and Joe were in the same boat, that he had never done a cert. petition.

Q. Did he say anything else.

A. He said he could go see Joe.

Q. No further questioning, your Honor.

THE COURT: Any cross examination?

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Cross examination

By Mr. Gorman:

Q. Mrs. Deans, perhaps I am a little confused on dates

here, and perhaps you can clarify it for me.

Mr. Washington was sent to the pen in what month of '85.

A. August, I believe.

Q. His schedule execution date was for when, do you recall?

A. I believe it was early September.

Q. Early September.

And was this at a time that the firm of Paul, Weiss, Rifkind, who eventually drafted a petition had entered this particular case that we are on here today?

A. Yes.

Q. I beg your pardon?

A. I don't know whether they noted appearance at that time. We were talking to them about the case.

Q. In fact you and representatives of Paul, Weiss, Rifkind had gone to Mecklenburg and met with Mr. Montgomery in August, is that not correct?

A. We had gone and met with Mr. Montgomery. I am not sure of the date.

Q. Before Mr. Washington went to the pen?

A. Yes, it was.

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Q. All right.

When Mr. Montgomery told you he didn't have any knowledge of how to draft a cert. petition, did you tell him, I will get you everything you need?

A. I told him Joe had everything he needed.

Q. You had also given him manuals, as I understand your prior testimony?

A. Mr. Montgomery?

Q. Yes.

A. Yes.

Q. Did you advise him to simply use those manuals to do it?

A. No, he is an attorney, not me.

Q. All right. When you, when he told you he didn't know how to do that, you didn't advise him at all?

A. All I told him was that Joe had the materials that they needed to do a cert. petition with that I had sent Joe materials.

Q. And that is what you told him?

A. Everything should be by then at the prison.

Q. Thank you.

A. Okay.

THE COURT: Miss Deans, did you realize that these, this institutional appointed attorneys appointed for the various institutions were available to actually draw

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pleadings?

A. No, sir, I did not.

THE COURT: This is the first time you have known about that?

A. No, this is not the first time. Mr. Kulp advised me of that in November in the meeting with Paul, Weiss.

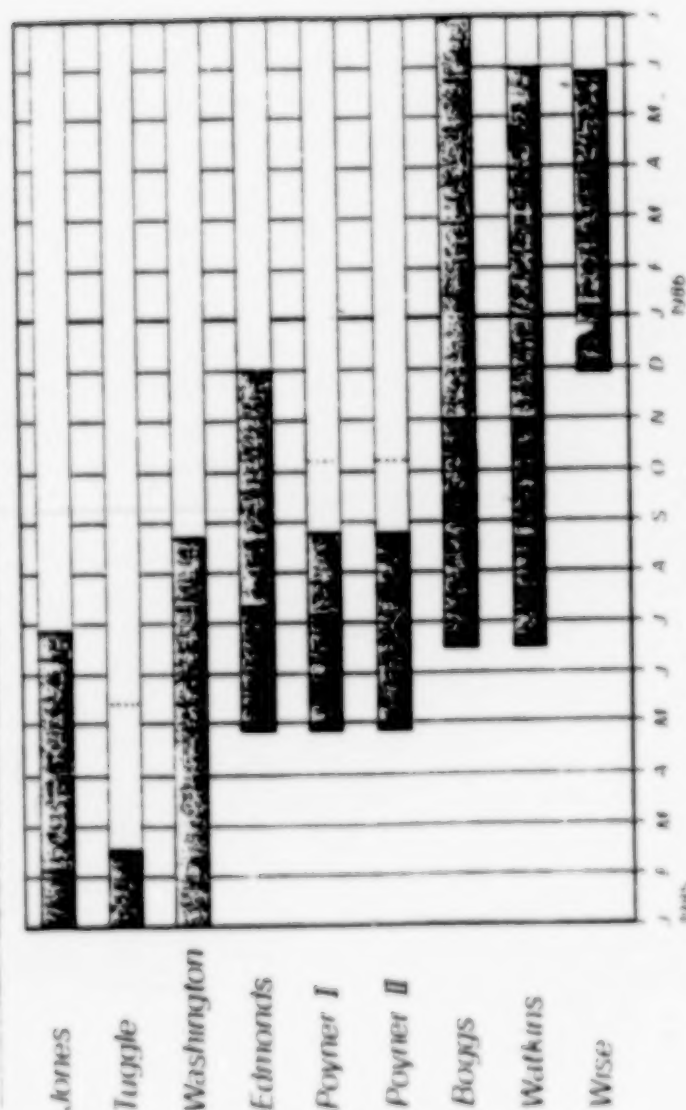
THE COURT: That they were available to do that?

A. That they could do that, yes.

THE COURT: And did you have a contrary understanding prior to that?

A. Yes, sir, I did.

Unrepresented Death Row Inmates / 1985 - 1986



Key: ☒ Time period during which had no lawyer either for certiorari or habeas corpus
☒ Time period during which did not have lawyer for habeas
Date of decision on petition for writ of certiorari

March 27, 1985

J. Lloyd Snook, III, Esquire
Paxson, Smith, Boyd & Gilliam, P.C.
Post Office Box 2737
Charlottesville, Virginia 22902

Re: Joseph M. Giarratano #118475 v.
Raymond K. Proconier
Civil Action No. 83-185-N

Dear Mr. Snook:

This is in response to your letter of March 22. I have today filed a report which addresses claims of procedural default and which, in my view, narrows the issues to those which should be addressed on the merits.

It is possible that a merits resolution of petitioner's claims may require an evidentiary hearing. Since, as a matter of policy, my strong preference would be to address at a single evidentiary hearing (if one becomes necessary) all matters with respect to which it is appropriate to take evidence, I have deferred ruling on your motion for an evidentiary hearing pending determination of some other need to take evidence.

Concerning your request for a transfer order to facilitate Mr. Giarratano's psychiatric examination by Drs. Blumberg and Shapiro, I am unwilling (even assuming propriety of such action) to compel transfer of petitioner to a particular institution. I gather from your letter that state authorities are not resisting any examination by mental health specialists retained by you but rather that you seek a transfer to accommodate these specialists. I suggest that you work through defense counsel to determine if a voluntary arrangement can be worked out as was done in 1983.

Concerning your request for an order appointing you to represent Mr. Giarratano, there is no occasion to enter such an order. You and Mr. Bonnie already represent the petitioner. The court would have occasion to appoint counsel only if petitioner were proceeding *pro se*. While I sympathize with the financial burden this case has become you, it would appear that this is a

J. Lloyd Snook, III, Esquire
Page Two
March 27, 1985

matter of arrangement between you and your client and not an occasion for the court to direct expenditure of government funds.

Very truly yours,

/s/ James T. Turner

James T. Turner
United States Magistrate

JTT:plg

cc: Robert H. Herring, Jr., Esquire
Mr. Joseph M. Giarratano #118475

In The
Supreme Court of the United States

October Term, 1975

No. 75-915

VERNON LEE BOUNDS, ETC., ET AL.,
Petitioners,

v.

ROBERT (BOBBY) SMITH, ET AL.,
Respondents.

R. L. TURNER, ETC.,
Petitioner,

v.

DONALD W. MORGAN, ET AL.,
Respondents.

JAMES HOLSHOUSER, ETC., ET AL.,
Petitioners,

v.

JOHN HARRINGTON, ET AL.,
Respondents.

**BRIEF OF THE COMMONWEALTH OF VIRGINIA AS
AMICUS CURIAE IN SUPPORT OF THE PETITIONERS**

ANDREW P. MILLER
Attorney General of Virginia
ALAN KATZ
Assistant Attorney General

Supreme Court—State Library Building
Richmond, Virginia 23219

in an 18-month period beginning in June of 1974 and ending in December of 1975 a total of approximately 1,639 petitions for habeas corpus or other relief. This is the equivalent to roughly 26 percent of the inmate population seeking access to the courts. Of course, there are situations in which one inmate files several petitions and the true percentage of the inmate population participating in the judicial process, it is submitted, is substantially lower than the estimate of 26 percent. Therefore, the establishment of prison law libraries would not materially contribute to the meaningful access to the courts by any greater number of inmates. This is especially true in light of the fact that such a large number of inmates now have access to the courts under the present Virginia system.

Given the underlying principle of meaningful access to the courts espoused by *Johnson* and *Gilmore*, the question of whether extensive law libraries satisfies that goal must be considered. The fact is inescapable that the average prison "writ writer" is, in spite of protestations to the contrary, uneducated, of borderline intelligence and often antagonistic towards the legal system which he views as responsible for his present predicament. The practice of law is at the least challenging and the interpretation of statutes, texts, and judicial decisions are often the subject of intense disagreement between scholarly and experienced counsel. It is submitted that furnishing prison inmates with an extensive legal library would be an exercise in futility, especially where the object of the exercise is to provide meaningful access to the courts.

The amicus curiae submits that the meaningful access to the court mandated by *Gilmore* and *Johnson v. Avery* can be accomplished as those cases recognized in a number of ways, only one of which is through the establishment of a law library. In *Hooks v. Wainwright*, 352 F. Supp. 163 (1972) it was held that

in order to insure that indigent inmates are not denied access to the courts, it is constitutionally mandated that prison authorities furnish indigent inmates with some form of legal assistance which assures meaningful access to the courts. The amicus curiae submits that this is a representative statement of the current state

of the law. Any assertion that that legal assistance must be in the form of extensive, expensive libraries fails to recognize that a law library is merely one tool to achieve the constitutional right of access to the courts. Further, it is submitted that law libraries are imperfect mechanisms to achieve this end at best. A law library in the hands of the average inmate is virtually useless, whereas, implementation of the system used in the Commonwealth of Virginia of appointed counsel gives to the uneducated indigent, inmate a source of information and experience at his fingertips he could never hope to duplicate in years of research in the most extensive legal library in imagination.

It is clear that no particular mode of access to the courts by prisoners is required, but that regulations or practices which can be construed as impeding such access are invalid. *Bryan v. Werner*, 516 F.2d 233 (3rd Cir. 1975). While it is conceded that the lack of a law library or of access to such a library might, absent alternatives, unreasonably restrict access to the courts, it is submitted that the requirement of access can be satisfied either by the availability of legal materials, by counsel, or by any other appropriate device. See *Cruz v. Hauck*, 515 F.2d 322 (5th Cir. 1975).

MEMORANDUM

TO: Attorneys Appointed to Represent Indigent Inmates of the State Penitentiary Pursuant to §53-21.2 of the Code of Virginia

FROM: The Honorable J. Randolph Tucker, Jr., Judge

DATE: February 16, 1978

1. You are to consult only with prisoners at the State Penitentiary at 500 Spring Street and not prisoners at the State Farms in Goochland and Powhatan.

2. The Attorney General's Office has indicated that the primary duties of attorneys appointed under the provisions of §53-21.2 of the Code of Virginia are to consult with inmates of the State Penitentiary with regard to: (a) the validity of their conviction; or (b) an inmate's federal constitutional attack upon the conditions of his confinement under 42 U.S.C. §1983. (See Memorandum of Assistant Attorney General, Reno S. Harp, III, enclosed herewith). It is important to explain this to the inmate at the first conference so that he does not expect you to handle matters in court for him or to become involved in problems not contemplated by the statute.

The requests with regard to validity of convictions will probably be largely concerned with assistance in filing of habeas corpus petitions. You are to assist prisoners with the preparation of petitions for habeas corpus irrespective of where the petition will be filed, but service under this appointment does not entail representation of the prisoner in a habeas corpus proceeding in this, or any other, jurisdiction. Other attorneys are appointed for that duty.

Insofar as questions regarding the manner of incarceration are concerned, the Attorney General's Office suggests that many of these can be resolved by an informal consultation with the Penitentiary authorities.

3. You are not to handle matters regarding recidivism or escape since attorneys have already been appointed with respect to these matters.

4. It is not contemplated that the type of matters to be handled under this Code Section should require any great amount of time for any one prisoner. Attorneys previously assigned to this work have found that many of the questions raised can be resolved quickly by means of consultation with the office of the Division of Corrections at 429 South Belvidere Street. If it appears that a question raised by a prisoner is going to require an extensive amount of work, the attorney should consult the court before proceeding. *The court may have to disallow the \$20.00 per hour rate in instances where an unreasonable amount of time has been devoted to work for one prisoner.*

5. Each attorney is to submit monthly reports on the form provided herewith. It is essential that a brief description of the nature of services performed be shown on the report opposite each notation as to hours spent on work for each prisoner.

6. Some inmates engage in the practice of seeking advice from more than one attorney appointed under this statute. In order to avoid this, each attorney will check with the Secretary to the Assistant Warden to make certain that the inmates assigned to him have not been previously represented by another attorney. If you do so find, it is your responsibility to report the name of that attorney to Judge Lumpkin's secretary, Miss Phillips, at 780-8894. In this situation you are *not* to consult with the inmate since the court will send the original attorney back to see if the inmate has any new problem. If you fail to follow the instructions of this paragraph and consult with an inmate who was assigned another attorney previously, you will not be paid for the time spent with such inmate.

JRT, JR

JRT, JR:jrm

MEMORANDUM

TO: All Attorneys Appointed Under § 53-21.2
FROM: Reno S. Harp, III, Deputy Attorney General
DATE: February 7, 1977
RE: Significance of the Appointed Attorney Program

Pursuant to § 53-21.2, Code of Virginia (1950), as amended, a copy of which is attached hereto, any judge of a court of record in whose county or city the State Penitentiary, prison farm or unit of the Bureau of Correctional Field Units is located, shall on motion of the Commonwealth's Attorney for such county or city as requested by the Superintendent of the correctional facility involved, appoint one or more attorneys to counsel and assist indigent inmates regarding any legal matter relating to their incarceration other than a matter pending in court *and* for which an attorney has been appointed or retained by the inmate.

Compensation of the attorney so appointed as directed by the Court, shall be based upon a reasonable hourly rate and necessary expenses as filed with the appointing Court on a monthly basis by the attorney.

It is expected that the appointed attorney will provide direct legal counsel in two primary areas: (1) an inmate's challenge to the validity of his conviction, by petition for writ of habeas corpus, and (2) an inmate's federal constitutional attack upon the conditions of his confinement under 42 U.S.C. § 1983. Assistance in these two areas may include either actual preparation of a petition for writ of habeas corpus or complaint filed under 42 U.S.C. § 1983, or alternatively, local informal administrative resolution of the matter. It is anticipated that the majority of the § 1983 complaints can be handled informally with the unit Superintendent or administratively within the Division of Adult Services. An attorney appointed under § 53-21.2 may not, however, counsel any inmate with reference to legal problems other than those relating to the validity of his conviction or conditions of confinement. Accordingly, counsel may not assist the inmate with respect to legal problems of a civil nature such as divorce, bankruptcy, etc.

MEMORANDUM

February 7, 1977
Page Two

It is further expected that the appointed counsel perform his duties in a responsible and timely manner. Accordingly, it is suggested that a reasonably *regular schedule*, convenient to the institution, counsel, and inmates, be promulgated and followed by the attorney to provide meaningful access to counsel. The critical significance of a responsible administration of § 53-21.2 duties must be underscored. This program of court-appointed legal assistance is designed to provide inmates with a viable alternative to state-created institutional law libraries. The United States Court of Appeals for the Fourth Circuit has ruled in the case of *Smith v. Bounds*, 538 F.2d 541 (4th Cir. 1975), that the state is required to provide inmates with adequate legal research facilities or an acceptable legal assistance program. Obviously, maintenance of such libraries would involve great expense to the Commonwealth. Nevertheless, the federal courts in this state have indicated that unless the § 53-21.2 program is implemented in a *professional and timely manner*, they will be constrained to order creation of inmate law libraries throughout the state.¹ Accordingly, present responsibility for effective legal assistance to inmates rests squarely on all attorneys appointed under § 53-21.2. I am sure that you will diligently carry out these duties imposed upon you. Your cooperation is essential.

The Assistant Attorneys General who are assigned to the Department of Corrections have frequently been able to assist attorneys in resolving some of the problems the attorneys have encountered. These attorneys will continue to render such assistance as necessary.

¹ The United States District Court for the Eastern District of Virginia (Richmond) recently awarded monetary damages, assessed personally against the *institutional Superintendent*, in a § 1983 action where the evidence disclosed that the appointed attorney had not fulfilled his duties in a responsible and timely manner. Obviously, institutional administrators are concerned about this exposure, particularly since they are essentially powerless to control the actual *delivery* of professional legal services under § 53-21.2.

August 6, 1985

Robert Patterson, Esq.
McQuire, Woods and Battle
Ross Building
Richmond, VA 23219

Dear Mr. Patterson:

Bob Evans, with the *Daily Press* said if I would send you a letter with the names of the attorneys I had contacted about taking Savasky Poyner's case, you would ask the Bar to find an attorney for Mr. Poyner.

Enclosed is a partial list. I cannot locate the second sheet right now, and would have to reconstruct the list by going back from my coded telephone list. We have 4 other death-sentenced men with filing deadlines in the near future, and I also assist on 19 cases, some of which also have near filing deadlines, so I just don't have time to reconstruct the entire list.

I am also enclosing a list of attorneys presently handling appeals for death-sentenced men.

The Virginia Coalition exists on donations. I have no staff assistance, and we are in danger of having to close by the end of September due to lack of funds. I come from South Carolina, and I have done similar work in most of the Southern states. Frankly, I find the situation surrounding due process for capitally sentenced indigents deplorable here. These men have nowhere else to turn but to a precariously funded volunteer organization and a handful of attorneys committed to due process. I have written and spoken with the Criminal Law Section of the Bar over the past 2½ years about this problem and the problems with the appointment process. Denny Dohnal and others are trying to alleviate the problems at the trial level, but that does not solve the enormous problems involved in recruiting volunteer attorneys to handle the appeals. The attorneys who do volunteer generally come from small firms or handle the cases after hours. They put in long hours with virtually no remuneration, and most often pay their own expenses.

Any assistance you can give through your position with the Bar and your firm will be greatly appreciated.

Robert Patterson, Esq.
August 6, 1985
Page Two

The status of Mr. Poyner's case is as follows: Appointed attorneys on two of Mr. Poyner's cases filed for rehearing, giving him an August 13th deadline for filing for Cert. Those petitions are being filed *pro se* with the assistance of another man on death row. Appointed attorneys on the 3rd case filed intent to motion for rehearing. They then thought they had filed the motion. When they were unable to find the order, I contacted the Virginia Supreme Court and learned the mandate was issuing the following week. An attorney from D.C. and one from Maryland worked together overnight to get an out-of-time Cert petition to the U.S. Supreme Court. That petition will be held until action on the other two, giving us a uniform filing date for state habeas. Therefore, we are seeking counsel for state habeas. Depending on how quickly the Supreme Court acts when they come back into session, the state habeas should be due sometime in the late fall.

Again, I will appreciate any assistance you can give.

Sincerely,

/s/ Marie Deans

Marie Deans

Attorneys, firms, *Pro Bono* committees and legal organizations contacted in efforts to find counsel for Savasky Poyner and three other men with no attorneys, all affirmed within a 30 day period. (partial list)

Gerald Trainer	David Fudala
Gary Sidell	Russ Canan (D.C.)
Ron Labowitz	Alan Clarke (took Jones case)
Marvin Miller	Jack Burtch
Gerald Zerkin	Steve Bright (GA)
(took Edmonds case)	Jerry Fisher (D.C.)
John Boatwright	Tom McGrath
Steve Bricker	Peggy Seiler
Charles Kramer	Carl Witmeyer
Patricia Steward (did	Thomas Wolf
out-of-time Cert for Poyner)	Joe Volpe
Bob Moran (did	Ken Weiner
out-of-time Cert for Poyner)	Christy Freeman (GA)
Jim Thorsen	John Copacino (D.C.)
Jeff Gleason	Steven Cribari (MD)
Gray Lawrence	Jim Hingely
Franklin Swartz	Barrett Jones
Matthew Ott	Watt Ellerson (Mr. Ellison
Steve Rosenfield	also contacted many attor-
Deborah Waytt	neys in his area with no pos-
Joel Berger (N.Y.)	itive results)

Pro Bono Committees

D.C. *Pro Bono* Reference
 McKenna, Conner and Cuneo
 Covington Burling
 Steptoe and Johnson
 Wilmer, Cutler & Pickering
 Hogan & Hartzen
 Pepper, Hamilton & Sheats — D.C.
 Pepper, Hamilton & Sheats — Philadelphia

Firms, additional

McQuire, Woods & Battle (Don King)
 Mays, Valentine, Davenport and Moore (Brad Davenport)

Firms, additional

Thomas Michi's firm (Tom Michi)
 Hunton & Williams (Jack Molenkamp had tried to find counsel in the firm last year, but indicated they couldn't take death cases.)

Legal Organizations

Legal Defense Fund
 Southern Prisoners' Defense Committee
 D.C. Law Students in Court

Attorneys presently handling appeals

Attorney	Case
Robert Geary	Herbert Bassett
Alan Clarke	Willie L. Jones
(Williams and Conally handled Mr. Jones on first Cert.)	
Jeremiah Denton	John LeVasseur
(Steptoe and Johnson assisting)	
Dennis Dohnal	Charles Stamper
Bob Hall/David Fudala	James Clark
Jeffery Gleason	Lem D. Tuggle
Timothy Kaine	Richard Whitley
(state habeas handled by Bob Hall)	
Charles Kramer (Hirschkop)	Buddy Justus
Ellen Kreitzberg	Timothy Bunch
(D.C. Public Defender)	
Gray Lawrence	Derick Peterson
Christopher Malone/Steve Northup	Albert Clozza
Wm. Moffatt/Rawles Jones	Earl Clanton
Peter Murtha/Brad Stetler (D.C.)	Edward Fitzgerald
Jonathon Shapiro	Wilbert Evans
William Slover	Dennis Stockton
Lloyd Snook/Richard Bonnie	Michael Smith
	Willie Lloyd
	Turner
	Joe Giarratano
	Alton Waye

(also handled Morris Mason — Arnold & Porter has just come in to assist on Giarratano's case)

Attorneys presently handling appeals

Attorney	Case
Jerry Zerkin (also assisted on James Briley's case)	Dana Edmonds
Gary Lawrence also represented Frank Coppola — executed 8/10/82	
Arnold and Porter also represented Manuel Quintana — died 11/7/83 and James Briley — executed 4/18/85	
Deborah Wyatt represented Linwood Briley — executed 10/12/84 (Covington-Hurling assisted at Federal level and on Successor)	
4 men — Poyner, Washington, Boggs and Watkins have no attorney. <i>Washington has a date of execution scheduled September 5th.</i>	
2 men — Wise and Frye are on direct appeal	

September 16, 1985

Ms. Mary P. Devine
Staff Attorney
Division of Legislative Services
General Assembly Building, 6th Floor
Richmond, Virginia 23219

Dear Ms. Devine:

In response to your telephone conversation last week with Kathy Mays of my staff, I have compiled the following information for use by members of the Indigent Defense Subcommittee appointed pursuant to House Joint Resolution #324:

- I. *Fiscal Year 1985 Expenditures for Indigent Defense by Circuits/Districts* (Table 1). This includes total costs for court-appointed counsel and the four public defender programs. Overall, indigent defense costs decreased 4.5 percent from FY84. Reimbursements to court-appointed counsel declined 6.2 percent during FY85 while public defender system costs rose 12.3 percent, according to information supplied to us by the Public Defender Commission.
- Statewide, a total of 64,395 indigent persons were represented by court-appointed counsel on 88,920 charges, or 1.4 charges per individual. The average cost per charge ranged from \$49.63 for an adult felony in the juvenile and domestic relations court to \$649 for a Class I felony in circuit court. The cost per charge in appeal cases reflects a combined figure for both misdemeanor cases appealed to the Circuit Courts as well as misdemeanor and felony cases appealed to the Supreme Court. (See Table 1-A)
- II. *Recoupment of Court-Appointed Counsel Costs* (Table 2). During FY85, Circuit and District Courts recouped \$1,160,168 in court-appointed counsel costs. Interestingly, this is considered to be one of the highest recoupment rates in the country.
- III. *Alternative Methods for Providing Indigent Defense Services*. In response to a request made by the 1981 General Assembly, the Supreme Court conducted a study to deter-

mine ways of containing costs within the "Criminal Fund," the largest category of expenses within which is court-appointed counsel fees. As a part of this effort, information was compiled on alternative systems for providing indigent defense services in use in the United States. Briefly, indigent defense systems are organized either at the state or local level. (See Table 3)

According to an 1982 ABT Associates survey, 17 states have defense systems which are organized on a statewide basis, while more than half of the states (31) have systems organized exclusively on the county level and/or by judicial circuit. A number of states have both types of systems in place.

There are two distinct types of indigent defense programs: public defender and private bar. There are numerous variations of the latter including:

- Ad-hoc assigned counsel programs — the system currently utilized in Virginia and some other states in which judges maintain lists of private attorneys who are appointed to represent indigents on a rotating basis;
- Coordinated assigned counsel programs — programs which provide for an administrative staff person in the local government or the local court to maintain the rotating list of private attorneys and to be responsible for ensuring that attorneys are available to the courts; and
- Contract defense programs — programs in which individual attorneys, bar associations or private law firms agree to provide defense services for a specified amount under contract with the local funding agency.

Each of these types of programs is further described in the report submitted by the Supreme Court to the General

Assembly entitled, "Cost Containment Within the Criminal Fund and Involuntary Mental Commitment Fund." An excerpt of this report is reprinted for your use as Appendix A.

The 1982 National Survey of Indigent Defense Services conducted by ABT Associates provides a breakdown of the type of system by county for each of the 50 states and District of Columbia. (See Table 4) According to this survey, 34 percent of the counties in the United States utilize a public defender program, 60 percent use assigned or court-appointed counsel programs, and 6 percent use the contract method for indigent defense services.

IV. *Nationwide Survey of Court-Appointed Counsel Fees* (Table 5). The most up-to-date survey on court-appointed counsel fees nationwide was conducted by the New York State Defender's Association in March, 1985. The survey was published recently by the American Bar Association and a copy is attached.

I hope that this information will be of use to the Subcommittee members and to you. If I may provide further explanation on any of the materials contained herein, please do not hesitate to contact me.

With kind wishes and best personal regards,

Sincerely,

/s/ Robert N. Baldwin
Robert N. Baldwin

RNB:vej

Enclosures

VIRGINIA: IN THE CIRCUIT COURT OF
CULPEPER COUNTY

COMMONWEALTH OF VIRGINIA

v.

FELONY-ORDER

EARL WASHINGTON, JR.

This day came John C. Bennett, Attorney for the Commonwealth, and Earl Washington, Jr., the defendant, together with John W. Scott, Jr., his retained counsel. The defendant stands convicted of a felony, to-wit: capital murder; and he was led to the bar in the custody of the jailer.

A motion to set a date for execution having been filed by the Commonwealth, and the Court having heard and considered the argument of counsel, it is, accordingly, ORDERED that the execution of the defendant is set for the 5th day of September, 1985.

Whereupon, the attorney for the defendant moved the Court for appointment of counsel to represent the defendant in any habeas corpus proceedings, which motion is denied.

The Court doth direct the Clerk of this Court to forward a copy of this Order to the Director of the Department of Corrections.

And the defendant is remanded to the custody of the jailer.

ENTER: /s/
Judge

DATE: July 3, 1985

Copy Mailed to:
Director, Department of Corrections
Superintendent of Mecklenburg Unit
John C. Scott, Jr.

VIRGINIA DEPARTMENT OF CORRECTIONS
INMATE GRIEVANCE FORM

Policy 4-14 Att. #3

3/1/84

Page 1 of 4

Inmate Name/Number: Joe Giarratano, 118475

Housing Unit: I-C-54, dr Institutional Log Number: 8502889

GRIEVANT'S STATEMENT

What is your complaint? The death row law library annex. The annex is useless to the majority of the men on death row. Such an annex requires someone trained in legal research technique before it can be used properly; and this still is lacking on death row with the exception of about 2 other individuals. In effect this institution has spent money on a useless annex. Cont.

What action do you want taken? That the annex be closed, and the books be transferred to the main law library for all inmates to use. And that trained personnel be placed in the law library to assist those who need it.

Type of grievance: Regular xxxx (See Page 2 for Level I
Emergency Response)

/s/ 118475 10/23/85
Grievant's Signature Date/Hour* Submitted

/s/ Tony Goode 10/23/85
Employee's Signature Date/Hour Received

INMATE GRIEVANCE

[PAGE TWO]

J. Giarratano, 118475

It is understood that the annex is an extra privilege for dr inmates, and does not barr access to the main law library. So in effect what the institution provides is an annex that d.r. cannot use (through lack of skills), and denies other inmates in the institution the use of these books becaues they are just sitting here not being used.

The inmate law clerk cannot assist d.r. inmates because he does not know how to do legal research. I was in the law library yesterday when two death row inmates (Boggs & Watkins), asked his assistance. The inmate clerk said that he did not have the slightest idea of what do to, nor did he even know what a petition for writ of certiorari was; and readily let the men know that he could not help.

This institution does provide 2 court appointed attorneys to supposedly "assist" the men on the row. This situation is a real joke for the following reasons:

They do not know the status of any of the men's cases, or what stage of the appeal process they are at. This in and of itself makes their assistance useless.

Before they could file an appeal they would need to reveiw the entire record of the particular case in question: most inmates do not have the record, and these court appointed attorneys would have to locate, study the recods before an appeal could even be attempted.

They do not have the resources or the time to even contemplate handling a death case on appeal. They have 360 clients, and have to be available to all the men at this institution — plus handle their private parctices.

Last but not least — their appoinment does not encompass representation of individual cases. Their appointment is only an advisory capacity.

Further, these appointed counsel are only here one day a week; and inmates do not have access to them while in the law library.

INMATE GRIEVANCE

[PAGE TWO]

J. Giarratano, 118475

If all this is wrong . . . notify counsel (appointed), and let them know that inmates Boggs & Watkins have cert petitions due, and that their *representation* is required . . . the deadLINE is 11/5/85.

JOSEPH M. GIARRATANO

LEVEL I RESPONSE - INFORMAL: Inmate/Staff Participation (Both Level I Responses, Informal and Formal, are to be completed within 15 calendar days)

Results of Informal Resolution Attempt: Firstly, inmates on death row will be given extra consideration for a separate law library annex and as a result will not be dismantled as you are recommending and consequently, I will refer you to LOI #22 dated 9-25-85 and memo to you from Mr. J. K. Killen dated 9-3-85.

- () I am satisfied with this response if implemented as stated.
() I am not satisfied with this response but I do not wish to appeal.
() I wish to appeal my grievance to the next appropriate step because: Evasive & avoids the complaint

Grievant's Signature: /s/ Date: 10/24/85
Employee's Signature: /s/ Date: 10/24/85

LEVEL I RESPONSE - FORMAL: Inmate/Staff Participation

Results of Formal Resolution Attempt (i.e., Committee/Abstracts): Situational - does not challenge policy or procedure. You may appeal to Level II.

Committee Members: /s/
(If Applicable)

Date: _____

- () I am satisfied with this response if implemented as stated.
() I am not satisfied with this response but I do not wish to appeal.

If you are dissatisfied with the Committee's response, you may appeal to Level II within five (5) calendar days. Fill out the section below, sign and date it, and forward it to your Superintendent/Warden. If you need assistance, see the Staff Grievance Coordinator. (NOTE: Summary of abstracts are automatically forwarded to Level II for consideration and response.)

- () I wish to appeal this response to the Superintendent/-Warden because: Evasive answer does not address complaint. Not situational - challenges policy and procedure.

Grievant's Signature: _____ Date: 10/28/85

INMATE GRIEVANCE APPEAL FORM

Joseph Giarratano #118475 Mecklenburg Corr. Center 8502889
Inmate Name/Number Institution Log
Number

LEVEL II: SUPERINTENDENT/WARDENS'S RESPONSE (To be completed and returned within eight (8) days.)

The law library annex is an additional privilege as you note. Just because you find it unbeneficial to you, does not mean that others find it so. In addition, if the majority of inmates want it closed I will do so.

/s/ _____ 11/6/85
Superintendent/Warden Date
If you are dissatisfied with the Level II response, you may appeal within five (5) calendar days to the Regional Administrator (or - for *classification matters only* - to the Assistant Director of Classification and Parole Administration).

October 18, 1985

Joseph M. Girratano, 118475
I—C—54, death row.

Cpl. C. Smith, Law Library Officer
Mecklenberg Correctional Cntr.

Dear Cpl. Smith,

It is requested that I be allowed to use the main prison law library. I apologize for not being able to make this request on the proper form, but the building officers could not locate any.

I will be in need of physical access on the following days: Tuesday 10/22/85, both morning and afternoon; Wednesday 10/23/85, both morning and afternoon; and Thursday 10/24/85, morning and afternoon.

I am currently under court deadline on my capital case: Habeas Corpus - Federal District Court at Norfolk. My deadline is 10/31/85. And research is needed to prepare legal briefs, and possibly a state habeas petition to exhaust state remedies.

I am also preparing two petitions for writ of certiorari to the United States Supreme Court for inmates Boggs and Watkins -since counsel could not be recruited to assist them on a pro bono basis. Both of these petitions have deadlines for November 5, 1985. Extensions for time will need to be filed, and these motions must be filed by 10/26/85 (by court rules). If these deadlines are not met this avenue of appeal will be barred as to these men. Ed Fitzgerald will be assisting in the preparation of these appeals.

Please notify me immediately if my request cannot be honored. I thank you in advance for your efforts in this regard. I am,

Respectfully,

/s/ Joseph M. Girratano, 118475

CC: JMG/file

DEPARTMENT OF CORRECTIONS
DIVISION OF ADULT INSTITUTIONAL SERVICES
MECKLENBURG CORRECTIONAL CENTER -
P. O. BOX 500
BOYDTON, VIRGINIA 23917

October 21, 1985

TO: Mr. J. Giarrantano, #118475; 1-C-54
FROM: J. Killeen, Operations Officer /s/ J. Killeen
SUBJECT: Law Library Request Received 10-21-85

We can get you to the Main Law Library Tuesday and Thursday morning -- the times allocated for Death Row inmates. However, we cannot guarantee the afternoons -- inmates from other buildings are scheduled for the afternoon times.

While I can certainly appreciate the intense litigation schedule you point out, yet such an intense schedule would seemingly be eased without waiting until the last minute. The resent Main Law Library hours available to you, the draw of books privileged and the use of Annex perhaps might have aided you in meeting the deadlines to which you refer.

JK/tl

cc: Law Library Officer
UMT, #1 Bldg.
File

VIRGINIA:
IN THE CIRCUIT COURT OF THE
COUNTY OF HENRICO

COMMONWEALTH OF VIRGINIA
v. Case No. 78F347, 78F349 & 78F351
CHARLES SYLVESTER STAMPER

ORDER

This day came the Defendant, Charles Sylvester Stamper, by and with the concurrence of all interested parties, and moved the Court for the substitution of counsel; and it appearing to the Court that the Defendant is without funds to pay attendant costs or to employ counsel but that counsel have volunteered to accept appointment, and deeming it otherwise proper and just to do so, it is hereby

ORDERED that Denis C. Englisby, Esquire and Edward D. Barnes, Esquire, of Englisby and Barnes, Richmond, Virginia be and the same are hereby allowed to withdraw as counsel of record on behalf of the Defendant and Dennis W. Dohnal, Esquire and Donna J. Katos, Esquire, of Bremner Baber & Janus, Richmond, Virginia are hereby substituted as counsel of record for said Defendant. It appearing that said counsel have volunteered for the appointment, it is hereby further

ORDERED that they shall not be reimbursed for other than, expenses, within the discretion of the Court.

It further appearing to the Court that Gary J. Spahn, Esquire, of Mays, Valentine, Davenport & Moore, Richmond, Virginia was appointed by the United States District Court for the Eastern District of Virginia to represent the Defendant in certain associated proceedings that transpired in such Court, it is hereby

ORDERED that Mr. Spahn is relieved of any responsibility as counsel for the Defendant before this Court.

ENTER: 7/17/84

Judge

Seen and consented to:

/s/ Charles Sylvester Stamper

Charles Sylvester Stamper

/s/ Denis C. Englisby

Denis C. Englisby, Esquire
Edward D. Barnes, Esquire
ENGLISBY and BARNES
P. O. Box 85
Chesterfield, Virginia 23832

/s/ H. Albert Nance, Jr. (Objected to as to costs for defendant)

H. Albert Nance, Jr. Esquire
Commonwealth's Attoreny for
the County of Henrico
P. O. Box 27032
Richmond, Virginia 23273

/s/ Gary J. Spahn

Gary J. Spahn, Esquire
Mays, Valentine, Davenport & Moore
P. O. Box 1122
Richmond, Virginia 23208

/s/ Dennis W. Dohnal

Dennis W. Dohnal, Esquire
Donna J. Katos, Esquire
BREMNER, BABER & JANUS
Suite 1500, 7th and Franklin Bldg.

September 5, 1985

Robert B. Condon, Esquire
Assistant Attorney General
Criminal Law Enforcement Division
101 North Eighth Street
Richmond, VA 23219

Re: Willie Leroy Jones

Dear Mr. Condon,

I thank you for your letter of August 30, 1985.

As you know, the appointment of counsel in *habeas corpus* cases is discretionary with the Circuit Court. I represented to Mr. Clarke I would appoint him counsel in this matter prior to the filing of the petition of the writ, therefore, I have entered the Order.

You may recall the difficulty in finding counsel in Virginia to represent Syvasky Poyner in his appeal to the United States Supreme Court. Of course, in that preceeding, I am sure no counsel was appointed, however, I personally feel that adequate and competent counsel should be encouraged to accept these important cases. It will be my practice generally to appoint counsel in all *habeas corpus* proceedings involving capital murder.

Yours very truly,

/s/ G. Duane Holloway

G. Duane Holloway
Judge

GDH/ct

cc: Alan W. Clarke, Esquire
J. Lloyd Snook, III, Esquire

August 30, 1985

Honorable G. D. Holloway, Judge
Circuit Court of York County
Main Street
P. O. Box 371
Yorktown, Virginia 23690

Re: Willie Leroy Jones

Dear Judge Holloway:

We are in receipt of a Motion For Appointment Of Counsel asking the Court to appoint Alan W. Clarke and J. Lloyd Snook, III, as counsel for Willie Jones. A proposed Order accompanied the Motion, and I am forwarding the proposed Order as seen and objected to.

Our objection to the entry of this Order is that Mr. Clarke and Mr. Snook have appeared in this case as counsel for Mr. Jones. They filed a petition for habeas corpus on behalf of Mr. Jones and endorsed it as counsel. Further, Mr. Clarke and Mr. Snook had the Court enter an order for a stay of execution, which he presented as Mr. Jones' counsel. Under Rule 1:5, *Rules of the Supreme Court of Virginia*, Mr. Clarke and Mr. Snook have appeared as counsel of record. Since they have appeared as counsel, Mr. Jones already has counsel and there is no occasion to enter an order appointing counsel.

In the case of *Darnell v. Peyton*, 208 Va. 675, 160 S.E.2d 749 (1968), the Supreme Court addressed the issue of counsel in habeas proceedings. Generally, the court concluded that an indigent petitioner has no constitutional right to assistance of counsel. The court recognized, however, that in circumstances where the petition is not dismissed as frivolous and a hearing is required, the petitioner is entitled to the assistance of counsel.

Under the circumstances of this case, Mr. Clarke and Mr. Snook are counsel for Mr. Jones, and *Darnell* would apply only where the petitioner is not otherwise represented. If Mr. Jones did not already have counsel, this Court might then have to appoint counsel. Under such circumstances it would be the court

Honorable G. D. Holloway, Judge
August 30, 1985
Page 2

who would exercise its discretion as to whom to appoint. Mr. Clarke and Mr. Snook have already decided to represent Mr. Jones and in effect would seek to remove the Court's discretion as to whom to appoint. If the Court were confronted with a *Darnell* situation, the Court would more than likely appoint local counsel rather than someone whose practice is located in another part of the state.

Under similar circumstances, Judge Carneal refused to appoint counsel where attorneys had already appeared as counsel of record. I am enclosing a copy of the order Judge Carneal entered on April 8, 1980, in the case of *Michael Marnell Smith v. Edward C. Morris*.

For these reasons we ask the Court not to enter any order appointing counsel in this case.

Sincerely,

/s/ Robert B. Condon

Robert B. Condon
Assistant Attorney General
Criminal Law Enforcement Division

3:54/110

cc: J. Lloyd Snook, III, Esquire
230 Court Square
Charlottesville, Virginia 22901

Alan W. Clarke, Esquire
Clarke & Clarke
P. O. Box 1240
Kilmarnock, Virginia 24284

VIRGINIA:

IN THE CIRCUIT COURT OF YORK COUNTY

WILLIE LEROY JONES,

Petitioner,

v.

Case No. _____

TONI BAIR,

Superintendent

Mecklenberg Correctional Center

P. O. Box 500

Boyton, Virginia 23917,

Respondent,

ORDER

The Circuit Court of York County deeming it appropriate to do so, hereby appoints Alan W. Clarke and J. Lloyd Snook, III to represent Willie Leroy Jones in this matter.

ENTER -

Date:

Judge

We ask for this:

J. Lloyd Snook, III, Esquire

230 Court Square

Charlottesville, Virginia 22901

Alan W. Clarke, Esquire

Clarke & Clarke

P. O. Box 1240

Kilmarnock, Virginia 24284

By: /s/ Alan W. Clarke

Seen and objected to:

/s/ Robert B. Condon

Robert B. Condon

Assistant Attorney General

101 N. Eighth Street

Richmond, VA. 23219

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF
JAMES CITY AND CITY OF WILLIAMSBURG

MICHAEL MARNELL SMITH,

Petitioner,

v.

EDWARD C. MORRIS,

Respondent,

CASE NO.3209

ORDER

Upon the application of the Petitioner for appointment of John C. Lowe and Richard J. Bonnie as his co-counsel in this matter pursuant to the authority contained in *Darnell v. Peyton*, 208 Va. 675 (1985) and other applicable authority, the Court denies the motion.

ENTERED this 8 day of April, 1980.

/s/ Russel M. Carneal

Russel M. Carneal, Judge

Seen and objected to:

/s/ John C. Lowe

Michael Marnell Smith

by John C. Lowe

April 14, 1980

John C. Lowe, Esq.
Attorney at Law
409 Park Street
Charlottesville, Virginia 22901

Re: Michael Marnell Smith VS Edward C. Morris
Case # 3209

Dear Mr. Lowe:

I am denying the motion of Petitioner for appointment of you and Richard J. Bonnie as court-appointed counsel in this matter.

Darnell vs: Peyton, 208 Va. 675 (1968) holds that Petitioner, Darnell, was denied assistance of counsel, at his plenary hearing after he made a timely motion for court-appointed counsel.

In the case at Bar, you and Mr. Bonnie alleged you were "Co-counsel for Petitioner". You filed a Petition for a Writ of Habeas Corpus on behalf of Petitioner on June 26, 1979. You appeared at a hearing in September 28, 1979. You and Mr. Bonnie appeared and represented Petitioner at a Evidentiary hearing on November 8, 1979.

The first time that the Court became aware that you and Mr. Bonnie had not been retained by Petitioner, his family or some friends was on November 16, 1979 when a letter dated November 14, 1979 enclosing a motion that you and Mr. Bonnie be appointed by the Court to represent Petitioner was received.

Thus I do not feel it proper to appoint you and Mr. Bonnie to represent Petitioner ex post facto.

Very truly yours,

/s/ Russell M. Carneal

Russell M. Carneal

RMC/chb

cc: Richard J. Bonnie
James E. Kulp

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF CORRECTIONS
ADULT INSTITUTIONAL SERVICES
PENITENTIARY

IOP 42
DATE October 15, 1984
SUBJECT: Access to Courts and Legal Services

I. **PURPOSE**

This IOP is designed to establish institution policy and procedures regulating inmate access to the courts, their legal representatives, court appointed attorneys and the institution's Law Library.

* * *

V. **DISCUSSION**

The inmate's right to have access to the courts, as well as legal representation and services is a necessary protection under the constitution and is consistent with established case law. Such access permits the inmate to challenge the legality of his conviction or incarceration and pursue legal remedies or seek redress with regard to matters related to his confinement as well as other problems or issues of a legal nature. Provisions in an institutional setting for access to the courts as well as legal counsel and services should be structured so that access is reasonable and procedures do not serve to abridge the inmate's constitutional rights. Additionally, such provisions should allow sufficient structure to prevent abuses of internal procedures as well as maintain good order and operations within the institution.

VI. **DEFINITIONS**

* * *

C. **Court Appointed Attorney:**

Attorney-at-Law appointed under Chapter 2, Section 53-21.2 of the Code of Virginia by the Richmond City Circuit Court to provide legal counsel to indigent inmates. Such counsel is approved at no cost to the inmate. Court appointed attorneys are authorized to provide legal counsel (advice) concerning matters related to the inmate's incarceration only. Such coun-

sel, however, does not include advice on matters of a personal nature not related to their incarceration nor will counsel include representation before a court of law, the Institutional Adjustment Committee or in institutional classification proceedings.

VII. PROCEDURES

D. Access to Court Appointed Attorneys:

1. Normally, attorneys-at-Law are appointed by the court for a period of one year. Notification of changes in appointments is by the Richmond City Circuit Court and is automatic.
2. The institution will publish and maintain posted on Inmate Bulletin Boards the name and business address of court appointed attorneys (see Attachment A). This listing will be published by the Assistant Warden for Treatment and will be maintained current and attached to this IOP.
3. It will be the inmate's responsibility to initiate contact with a court appointed attorney for the purpose of requesting legal counsel. Such contact should be by written correspondence.
4. Court appointed attorneys will not be changed once secured by an inmate. Further appointment of counsel will require compelling and extraordinary reasons pending written request and explanation by an inmate to the Assistant Warden for Treatment.

F. Law Library Services:

1. A Law Library is provided and located in the institution in the Recreation Building.
2. The Law Library will be open to the general population during a regular set of hours which are to be posted in the institution. Inmates must secure a pass and will be scheduled for access to the Law Library by the Recreation Building Officer in conjunction with the Cellhouse OIC.

3. Books *may not* be checked out or removed from the Law Library.
4. The Law Library will come under the immediate supervision of the Recreation Supervisor.
5. The Law Library will be inventoried at least once annually and reference materials replaced or added as space and funds permit.
6. All books or reference materials ordered for the Law Library will be approved and cleared in advance through the Assistant Warden for Treatment. The Assistant Warden for Treatment will critique the annual Law Library inventory in conjunction with the Attorney General's Office and procure additional books and reference materials prescribed as space and funds are available.
7. Reference materials requested by inmates confined in "C" Cellhouse, "B" Basement, Infirmary or Death Row will be researched and requested materials, as available, photocopied. Specific provisions for such service are contained in IOP Number 803.1, "Inmate Photocopying Services."

G. Access to Legal Materials:

1. The legal materials listed below will be provided to inmates in reasonable quantities upon request at the locations indicated:

ITEM	LOCATION
—Writ Paper	Cellhouse, Back Office
—State and Federal Habeas Corpus forms	Cellhouse, Back Office
—1983 Forms	Cellhouse, Back Office
—Legal Envelopes	Cellhouse
—Carbon Paper	Cellhouse

2. Inmates will be allowed up to two dollars (\$2.00) in free postage per week for legal mail purposes.

POST: ALL INMATE BULLETIN BOARDS
MAINTAIN PERMANENTLY

IOP No. 42
October 1, 1984
ATTACHMENT A

NOTICE

INMATE ACCESS TO COURT APPOINTED ATTORNEYS

II. PROCEDURES

1. Inmates wishing to seek the assistance of a court appointed attorney should contact one of the designated attorneys direct by initiating written correspondence. Such correspondence should state the specific reasons for and nature of the request.
2. Court appointed attorneys are not to be changed once secured by an inmate. A change or further appointment of counsel will require compelling and extraordinary reasons pending written request and explanation by an inmate to the Warden.
3. Court appointed legal advisors are attorneys selected by the judicial system to provide indigent inmates with *legal counsel* only. They are *not* intended to provide *legal representation* at courtrooms or other legal hearings while serving in this capacity.
4. Court appointed legal advisors may be secured only for matters as it relates to an inmate's incarceration at the institution. These advisors will not provide counsel in concerns pertaining to divorce, wills, Adjustment Committee Hearings, Institutional Classification Hearings or other personal matters.

IOP #42
ATTACHMENT C

COURT APPOINTED ATTORNEYS AND
LAW LIBRARY SERVICES

I. COURT APPOINTED ATTORNEYS

The Virginia State Penitentiary provides inmates with access to court appointed attorneys by the Richmond City Circuit Court. Such access will be through established correspondence procedures and authorized visits at the institution. Court appointed attorneys are furnished to provide legal counsel to indigent inmates. Court appointed attorneys are authorized to provide legal counsel (advice) concerning matters related to the inmate's incarceration only. Such counsel, however, does not include advice on matters of a personal nature not related to their incarceration nor will counsel include representation before a court of law, the Institution Adjustment Committee or in institutional classification proceedings.

The name and business address of court appointed attorneys is posted in the institution and is also attached to Institutional Operating Procedure #42, "Access to Courts and Legal Services." All inmates should use the correspondence procedure when initiating contact with a court appointed attorney.

II. LAW LIBRARY SERVICES

The Virginia State Penitentiary provides a limited law library which is located in the Recreation Building. This Library is limited in scope to the availability of funds and space. Inmates are permitted access to the institution Law Library during scheduled periods which are posted in the Recreation Building. Inmates must obtain a pass from the Cellhouse Officer-in-Charge and be scheduled for access to the Law Library by the Recreation Building Officer. Special provisions will be made to facilitate inmate access to the Law Library in the case of those inmates who are segregated or confined in such a manner as to otherwise prohibit access to the Law Library.

TO: Mr. Al Taylor, Law Library Supervisor
FROM: G. Cooley and C. Taylor, Library Clerks

INVENTORY LIST OF LAW LIBRARY BOOKS

Law Library (VSP) Richmond

June 27, 1986

U.S. Supreme Court Reporters, Vols. 74 thru 103A
Vols. 86A and 95A missing (53 total hardback books), in
addition there are 52 softback update issues to this set.

F.2d, Vols. 270 thru 783 (Vols. 540 and 669 missing) 511 hard-
back books in addition there are 12 softback update issues
to this set

F.Supp., Vols. 176 thru 623 (Vol. 409 missing) 447 hardback
books in addition there are 16 softback update issues to this
set.

S.E.2d, Vols. 1 thru 338/336 hardback books (Vols. 200 and 233
missing) in addition there are currently 17 softback update
issues to set.

U.S.C.A. (General Index) 8 softback volumes.

U.S.C.A., Titles 1 thru 50 and const. amendments / 189 total
volumes.

Code of Virginia (1950) as amended (General Index) 3 soft back
volumes.

Code of Virginia (1950) as amended, Vols. 1 thru 11 (Vols. 2 and
4 missing to the set) 23 hardback books.

Va. Blue and White Book (Parallel Citation Tables) 1 Book.

Va. & W.Va. Digest, Vols. 1 thru 20/ Vol. 6A missing/ 40 hard-
back books.

Corpus Juris Secundum, Vols. 7, 14, 22, 22A, 23, 24, 24A, 24B,
28, and 67/ 11 hardback books.

Moore's Federal Practice, Vols. 1 thru 13/ 34 total volumes.

Moore's Rules Pamphlet with Comments (1986), Part 1, Part 2,
Part 3 2 Sets (6 softback volumes)

Michies Jurisprudence of Virginia and West Virginia, Vols. 11,
19, 20, 21 and 21B. (5 Books)

Inventory List of Law Library Books: continuation page two
Shepard's Citations (All Federal Courts) 21 hardback books
plus softback updates.

Sherpard's Citations (Virginia) 1 book (no update issues)
Va. Rules Annotated (1985 Edition) 1 vol.
Federal Civil Judicial Procedure and Rules (1985 Edition) 3
volumes.
Criminal Law Reports (1985-1986) 1 loose-leaf binder.
4th Circuit Manual (1985) 1 loose-leaf binder.
Various DGL's and IOP's 5 loose-leaf binders.

HORN BOOKS

Black's Law Dictionary, Henry C. Black/ West Pub. 1 copy
Legal Research in a Nutshell, Morris L. Cohen/ West Pub. 2
copies
Law & American History, West Pub. 1 copy
Fed. Pract. and Procedure, West Pub. Vols. 1, 2, 3, 3A (4 Books)
Criminal Procedure, La Fave/ Scott, West Pub. Vols. 1, 2, 3, (3
Books)
Criminal Law, West Pub. 1 gen. volume
Criminal Procedure, West Pub. 1 gen. volume
Federal Habeas Corpus, Michie Pub. 1 copy
The Law of Evidence in Virginia, Michie Pub. 1 copy
Prisoner's Self Help Litigation Manual, Oceana Pub. 4 copies
Virginia Civil Procedure, Michie Pub. 1 copy
The Layman's Guide to Virginia Law, Michie Pub. 1 copy
Weinstein's Evidence, Bender-Publisher, 4 separate volumes
Cases & Materials on Torts (1 Gen. volume) 4 copies

NOTE: all of the books listed in this inventory are in at least fair
condition.

LAW BOOKS & MATERIALS UPDATED WEEKLY,
MONTHLY OR YEARLY

Code of Virginia (1950) as amended (at odd intervals as the law changes)

Supreme Court Reporter (monthly, when Court in session)

Federal Reporter (monthly)

Federal Supplement (monthly)

South Eastern Reporter (monthly)

United States Code Annotated (yearly)

Moore's Federal Practice Rules Pamphlet (yearly)

Virginia & West Virginia Digest (yearly)

Criminal Law Reports (twice monthly)

Moore's Federal Practice (yearly)

Shepard's Citations (monthly)

Va. Blue & White Book (monthly)

4th Circuit Manual (yearly)

Virginia Rules Annotated (yearly)

* the above listed updates are currently being received in the law library

I.O.P. Inmate Law Library Va. State Penitentiary

VIII Procedures

7. Inmate access to law library

The law library is open to the general population Mon.-Sun. There is a limit allowed in this area at one time. (10 inmates) See attachment A for law library operating hours.

Inmate access to law library

Shop Workers: All inmates working in the shop areas are allowed access to the law library three days a week for a period of one hour each day.

C—Cell: Inmates isolated in the C—Cell section upon a written statement by them that the treatment counselor in charge of C—Cell, stating what law materials needed, will be given zerox copies of law materials if available.

B—Basement: Inmates housed in the B—Basement area are allowed access to law library by obtaining a pass to library area, Mon.-Sun.

Infirmary: Upon written request to the recreation dept. or the law library clerk outlining what materials are needed, the inmate will receive zerox copies if available.

A—Basement-East: Upon receiving written or verble request, the inmate will be given access to his request by zerox copies or law books whichever is needed. The recreation supervisor will deliver these materials to security in charge of section.

MECKLENBURG CORRECTIONAL CENTER
ORIENTATION

[Page 14]

Legal Issues

Mecklenburg operates under an agreement between the Department of Corrections and the American Civil Liberties Union, as a result of a class action suit in 1983. Mecklenburg is very proud of the fine manner in which we comply with the agreement. Copies of the agreement are available through the law library officer.

Mecklenburg operates an extensive law library for use by inmates. You should fill out a request form in order to obtain an appointment in the law library if necessary, and you will be put in one of three priorities according to the nature of your request. Inmates with court filing deadlines are given first priority, followed by those with current cases without deadlines, and finally those seeking information on contemplating litigation.

Photocopy services are also available with limits for legal copies. Copies requested over the limit or of a non-legal nature must be paid for at a rate of 15¢ per page. Notary services are also available through the UMT or law library.

Orientation
[Page 15]

Two attorneys have been appointed by the Circuit Court of Mecklenburg County to assist inmates with legal matters relating to their incarceration. The procedure to get an appointment with one of the attorneys will be discussed with you by the UMT.

If you have either hired or appointed for you an outside attorney, you may visit with him upon his request to the Assistant Warden for Programs. Appointments will be made for a legal visit during normal work hours.

MECKLENBURG CORRECTIONAL CENTER
LAW LIBRARY INVENTORY
June 25, 1986

1. Code of Virginia
(complete)
2. Virginia Rules Annotated (Michie) 1983-85
3. Federal Supplement (2d)
Volumes 170-622 (West)
4. Federal Reporter (2d)
Volumes 270-792 (West)
5. U.S. Supreme Court Reports
Volumes 1-79, Index (Sawyers' Cooperative Pub.)
State Case Service
(3 volumes)
6. U.S. Supreme Court Digest
Volumes 1-20 (Sawyers)
General Index
1 Volume
7. U.S. Code Service
Titles 1-50 (Sawyers' Ed.)
Tables: Court Rules
Administrative Rules Procedure
Constitutions
UnCodified
General Index
U.S. Code Guides
Rules of Bankruptcy
8. Virginia Reports
(Volumes 201-228)
9. Acts of Assembly
2 Volumes
10. Moore's Federal Practice
Volumes 1-13 (Matthew Bender) (2nd Ed/)
11. Bender's Practice Forms
Volumes 1-5, (Matthew Bender) Index

12. Bender's Forms of Discovery
Volumes 1-16 (Matthew Bender)
13. Weinstein's Evidence
(Matthew Bender)
U.S. Rules. Volumes 1-5
Index Tables 1 Volume
Table of Cases 1 Volume
14. Federal Citations
From 1969 with Supplements. (Shepard's)
15. U.S. Citations
(Shepard's)
Constitution, Codes
Statutes, Treaties
Court Rules
16. All Virginia Cases
(Shepard's)
17. Prisoner's Self Help
Litigation Manual. 4 copies
18. Criminal Law Reporter
(BNA) Weekly subscription
19. Prisoner Petitions In The Fourth Circuit
(yearly issue)
20. Virginia Lawyer
Chapter 14 (Habeas corpus)
Chapter 18 (Negligence actions)
21. Rules of the Fourth Circuit Court of Appeals
22. Rules of the United States Court of Appeals
11th Circuit
23. Rights of Prisoners
(Cohen)
24. Virginia Law Digest
1984 Topical Index
25. Rules of the United States District Court for the Eastern
District of Virginia

26. Recommended Procedures for Handling Prisoner Civil
Rights Cases in the Federal Courts
(Federal Judicial Center)

Total number of Volumes (hardbooks): 1,556

A256-M330

DIVISION OF INSTITUTIONAL SERVICES
POWHATAN CORRECTIONAL CENTER
STATE FARM, VIRGINIA
INSTITUTIONAL OPERATING PROCEDURE #5

DATE: June 28, 1985

SUBJECT: Court Appointed Attorneys

IV. POLICY

It is the policy of the Powhatan Correctional Center to provide inmates with unimpeded access to appropriately appointed attorneys under the provisions of Section 53.1-40 of the Code of Virginia.

V. DISCUSSION

Inmates have a constitutionally protected right of access to the courts. One of the ways that this access is insured is through a system of court appointed attorneys. In order to insure that this access is unimpeded, it is appropriate that the contact between inmate and attorney be direct, without using the Powhatan Correctional Center administration as a coordinator.

VI. DEFINITIONS

A. Court appointed Attorney — An attorney appointed by the judge of the Powhatan Circuit Court, in accordance with Section 53.1-40, who provides legal services to inmates at the Powhatan Correctional Center.

ATTACHMENT

53.1-40.

APPOINTMENT OF COUNSEL FOR INDIGENT PRISONERS

The judge of a circuit court in whose county or city a state correctional facility is located shall, on motion of the Commonwealth Attorney for such county or city, when he is requested to do so by the superintendent or warden of a state correctional facility, appoint one or more discreet and competent attorneys-at-law to counsel and assist indigent prisoners therein confined regarding any legal matter relating to their incarceration.

Below is a list of names, addresses and telephone numbers of the attorneys presently appointed to assist indigent inmates at the Powhatan Correctional Center.

Mr. Richard S. Blanton
Attorney-at-Law
P.O. Box 153
Cumberland, Virginia 23040
Telephone Number (804) 492-4728

Mr. Robert G. Woodson, Jr.
Attorney-at-Law
P.O. Box 165
Cumberland, VA 23040
Telephone Number (804) 492-4800

Mr. James P. Baber
Attorney-at-Law
P.O. Box 146
Cumberland, VA 23040
Telephone Number (804) 492-4891

FACT SHEET FOR SECURITY HOUSING

Below is an alphabetical listing of issues and items which each inmate in the security housing facility (M-Building) should be aware of:

LEGAL ACCESS

- (1) All requests for law books are to be made through your counselor. (IOP 861.1, pg 4)
- (2) All legal attorney call requests will be directed to the Chief of Security - Major Sanfilippo. (IOP 861.1, pg 4)
- (3) A list of appointed counsel for indigent prisoners is tacked on the bulletin board in the M—Building hallway and can be acquired from your counselor.
- (4) All requests for reproduction of copies should be made to your institutional counselor. The cost for reproduction is 10 cents per page. (IOP 856)

POWHATAN CORRECTIONAL CENTER LAW LIBRARY INVENTORY

June 17, 1986

Section I

1. Code of Virginia

Set is complete with 14 volumes. One reservation is Book 2, title 8.01 is the 1977 replacement. It is believed there has been another replacement since 1977.

2. Virginia Reports

All are present prior to 1900. Series picks up at volume 201 and runs through 229. At this time 208, 209, 210 and 217 are missing.

3. Federal Reporter

Up to date.

4. Federal Supplement

Up to date

5. U.S. Supreme Courts Reports (Lawyer's Edition Second)

Volumes 8, 16, 41 missing.

6. Shepard's Virginia Citations

Up to date.

7. Shepard's U.S. Citations

Up to date.

8. The Criminal Law Reporter

Up to date.

9. Black's Law Dictionary

We have two copies.

10. Criminal Law: LaFave and Scott

Copy is present.

11. Federal Habeas Corpus: Sokol

Two copies present.

12. Legal Research: Cohen

12 continued

Not present but we do have *Legal Research Illustrated*
by Jacobstein & Mershy.

13. Titles 18:28, 2241-2254, Rules of Appellate Procedure, Rules
of Civil Procedure; 42 section 1890-2010.

Up to date. We also have *Virginia Rules Annotated*.

14. Rules of the U.S. Court of Appeals for the Fourth Circuit.
Copy is present.

15. Rules of the U.S. District Court for the Eastern District of
Virginia.

Copy is present.

Section II

1. United State Code Service
Present.

2. Bender's Federal Practice Forms
Present.

3. Virginia Law Reprints.
Present.

April 17, 1986

Vivian Berger, Esquire
16th Floor
99 Hudson Street
New York, New York 10013

Re: Joe Lewis Wise

Dear Vivian:

This letter will serve to confirm our telephone conversation
of this date in which you agreed that a petition for a writ of
habeas corpus would be filed on behalf of Mr. Wise in the
Circuit Court of Mecklenburg County by May 30, 1986. In
exchange for this agreement I have called the local prosecutor
and have requested that no new execution date be fixed at this
time. The local prosecutor has indicated that he will make this
recommendation to the local court.

You indicated that you were attempting to find counsel in
Virginia to represent Mr. Wise. I advised you that the attorney
appointed to represent inmates at the Mecklenburg correctional
facility is available to assist Mr. Wise in the filing of his petition.

If I can be of any assistance to you in this matter, please let
me know.

Sincerely yours,

/s/ Jim
James E. Kulp
Senior Assistant Attorney General
Criminal Law Enforcement
Division

cc: Katharine Spong
Assistant Attorney General
Criminal Appellate Section

3:2/189

April 22, 1985

James E. Kulp, Esq.
Senior Assistant Attorney General
Criminal Law Enforcement Division
Supreme Court Building
101 North Eighth Street
Richmond, VA 23219

Dear Mr. Kulp:

Thank you for your letter of April 17. I appreciate your promptness in confirming our arrangement. However, since I believe that your confirmation is not entirely accurate, I wish to respond with my understanding of our mutual commitments.

As you recognize (§2, line 1), I am no longer representing Mr. Wise and will not represent him in the future. Accordingly, I cannot - and could not - promise you that a petition for a writ of state habeas "would be filed on behalf of Mr. Wise ... by May 30, 1986." I could - and did - only undertake to use my best efforts to attempt to ensure that someone would represent Mr. Wise, and that that person would attempt to file a petition by that date. That is what I promised - in return for which, as I understand, you promised to try to hold off the local prosecutor. In line with what you said, I also understood that if no one filed a petition by May 30th, the state would feel free at that point to request that the court set a new date for Mr. Wise's execution.

Finally, I am sure you never advised me that the Mecklenburg correctional facility attorney could assist Mr. Wise in filing his petition. I am sure that I would have remembered any such statement because, since I am familiar with the *Giarratano* lawsuit, I am aware of allegations that any such assistance is inadequate. In any event, the point is moot since Mr. Wise is imprisoned at Powhatan, not Mecklenburg.

Thank you for your cooperation in this matter.

/s/ Vivian Berger

Vivian Berger

May 1, 1986

Vivian Berger
Legal Defense Fund
99 Hudson Street
New York, New York 10013

Re: Joe Lewis Wise

Dear Vivian:

I have received your letter dated April 22, 1986, and would have responded earlier except I have been out of the Office.

As you point out in your letter, you had stated that you would no longer be representing Mr. Wise, but I understood you to say that you felt confident that someone would be representing him and could file a petition for habeas corpus by May 30, 1986. I am also quite confident that you were advised that the Mecklenburg correctional facility attorney was available to assist Mr. Wise with his State habeas petition. If you will recall, you first discussed this matter with Margaret Spencer of this Office, and she indicated that the Mecklenburg attorney could assist Mr. Wise. When you called me, you expressed concern that the Mecklenburg attorney might be involved in the case where it was apparent that a claim of ineffective assistance of counsel would surely arise in any petition for habeas corpus. I then explained to you that we were not talking about the trial attorney from Mecklenburg County, but that the institutional attorney for the Mecklenburg correctional facility would be available to assist Mr. Wise.

In any event, I now advise you that whether Mr. Wise is imprisoned at Powhatan, Mecklenburg or any other correctional facility in Virginia, that the institutional attorney appointed by the respective court to represent inmates at the specific institution is available to assist Mr. Wise in filing a petition for habeas corpus. I will be happy to supply you with the name, telephone number and address of any institutional attorney you may desire.

I want to make clear that there is no duty upon you or anyone else to attempt to find an attorney to assist Mr. Wise. You are free, of course, to do so, but the institutional attorneys have been appointed for that very purpose. I request that you contact the appropriate institutional attorney by May 10, 1986, if you have not otherwise found someone to represent Mr. Wise. In that way, Mr. Wise's rights can be fully protected.

Sincerely yours,

James E. Kulp
Senior Assistant Attorney General
Criminal Law Enforcement
Division

3:2 / 189

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF) CRIMINAL NUMBER
VIRGINIA) 32737
)
VERSUS) INDICTMENT -
) Capital Murder
RICHARD LEE WHITLEY)

IT APPEARING TO THE COURT that the Defendant, RICHARD LEE WHITLEY, has exhausted all direct appeals in this case and the date for the execution of the sentence of death has been set for May 9, 1983.

The Defendant, by motion filed on April 25, 1983, advised the Court that he intends to file a Petition for a Writ of Habeas Corpus and requested that the Court appoint Counsel to assist him in the preparation of the said Petition for a Writ of Habeas Corpus. The Defendant further requested that the Court stay the execution of the sentence of death so that the Defendant may file the said Petition for a Writ of Habeas Corpus.

The Court ORDERED, without objection by the Commonwealth's Attorney, that the said motions be granted. It is ORDERED that Robert Hall, an able and experienced Attorney at Law practicing before this Court, be appointed to represent the Defendant in the preparation of the Petition for the Writ of Habeas Corpus and any subsequent proceedings in said Petition, if any.

It is further ORDERED that the execution of the sentence of death be stayed until June 1, 1983. It is ORDERED that the Defendant, RICHARD LEE WHITLEY, die by electrocution in the electric chair within the confines of the State Penitentiary in Richmond, Virginia, on the 1st day of June, 1983.

It is ORDERED that the Clerk of this Court promptly furnish a copy of this order to the Director of the Department of Corrections. It is further ORDERED that the Director cause a copy of the order to be delivered to the Defendant and, if he is unable to read it, cause it to be explained to him at least ten days before the date fixed for execution and make return thereof to the Clerk of this Court.

The Court further ORDERED that no further motion for a stay of the execution of the sentence of death will be granted unless said motion is made subsequent to the filing of a Petition for a Writ of Habeas Corpus.

It is ORDERED that the Clerk of this Court send certified copies of this order to the Commonwealth's Attorney, Counsel for the Defendant and the Director of the Department of Corrections.

ENTERED this 27th day of April, 1983.

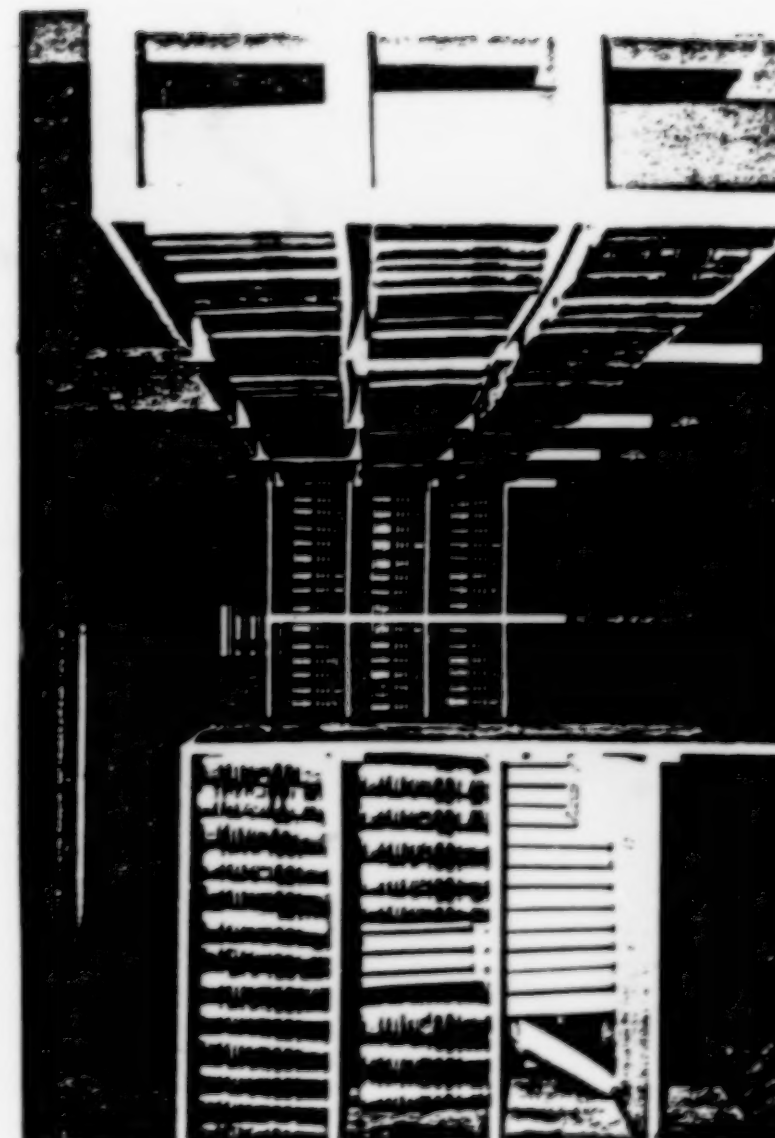
/s/ F. Bruce Bach

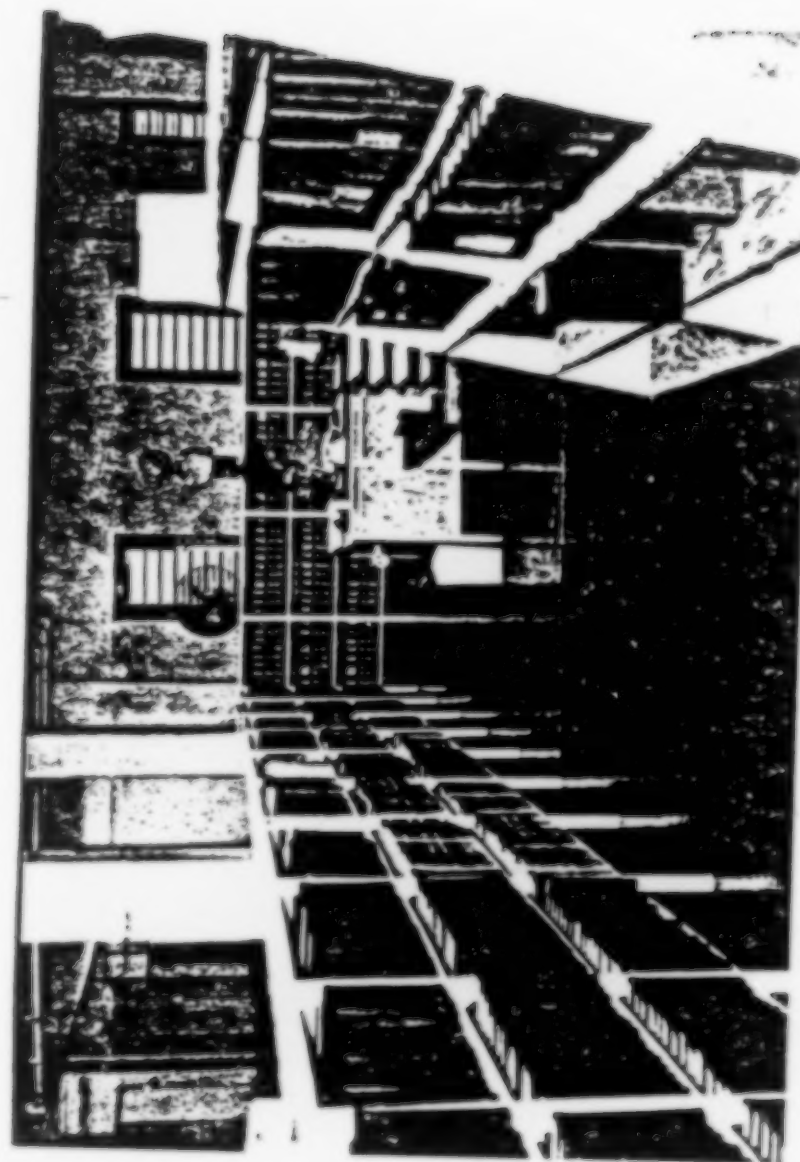
JUDGE F. BRUCE BACH

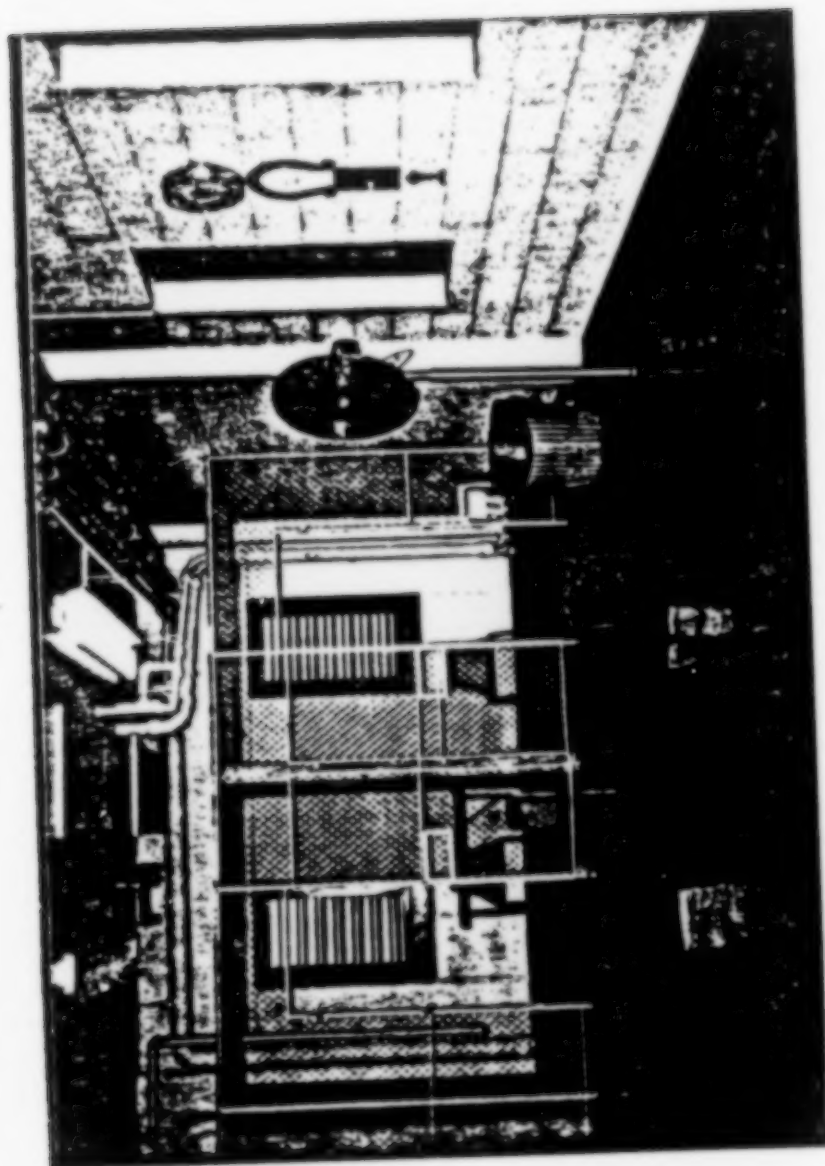
Seen and Agreed.

/s/

Assistant Attorney for the Commonwealth







The Order and Memorandum Opinion of the United States District Court for the Eastern District of Virginia, dated December 18, 1986, is found in the Appendix to the Petition For A Writ of Certiorari at A-23.

The United States Court of Appeals for the Fourth Circuit (*en banc*) Opinion, dated June 3, 1988, is found in the Appendix to the Petition For A Writ of Certiorari at A-1.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOSEPH M. GIARRATANO,
JOHNNY WATKINS, JR.,
RICHARD T. BOGGS,

Plaintiffs-Appellees,

v.

RECORD NOS. 87-7518 (L)
87-7519

EDWARD W. MURRAY, et al.

Defendants-Appellants.

MOTION FOR STAY OF MANDATE

Edward W. Murray, et al., defendants-appellants in this appeal, move this court for an order staying the issuance of the mandate in the above-entitled cause for a reasonable period of time. This motion is made under the provisions of 28 U.S.C. § 2101(f) and Rule 41(b), *Federal Rules of Appellate Procedure*, to enable the defendants-appellants to file a proper and timely petition for a writ of certiorari from the Supreme Court of the United States.

**GROUND FOR THE PETITION FOR A
WRIT OF CERTIORARI**

The petition for certiorari will seek review of this Court's *en banc* decision of June 3, 1988. By a 6-4 vote, a majority of the *en banc* Court voted to affirm the judgement of the district court requiring the appointment of counsel for inmates challenging their death penalty in a state habeas corpus proceeding. The right to representation by counsel was based on the right of meaningful access to the courts.

The grounds that will be presented in support of the petition for a writ of certiorari involve substantial questions of constitutional law. The defendants will raise the following issues:

1. The right of meaningful access to the courts does not require representation by counsel in the state habeas corpus proceedings. The right of access imposes limited obligations on the states: to provide inmates with law libraries or assistance of persons trained in the law. *Bounds v. Smith*, 430 U.S. 817, 828 (1977). The defendants have met their constitutional obligations as specified in *Bounds*.

2. There is no legal basis for extending the right of meaningful access to include a right to counsel in state habeas corpus actions. The right to representation by counsel declared in this case is inconsistent with the restricted nature of the right of access to the courts. Requiring representation is a substantial step beyond any prior decision of this Court concerning the extent of the right of meaningful access and is inconsistent with the interpretations of that right by a substantial majority of the other federal circuit courts.

3. This Court's decision is in conflict with the decision of the Supreme Court in *Pennsylvania v. Finley*, — U.S. —, 107 S.Ct. 1990, 95 L.ED.2d 539 (1987), which found that there is no constitutional right to counsel for state post-conviction proceedings.

4. There is no legal basis to support an automatic right to counsel for inmates in state post-conviction proceedings because they have been sentenced to death.

The issues raised in this case present serious questions federal constitutional law which have not been settled by the Supreme Court and which have national scope. This Court's decision concerning the extent of the state's obligation under *Bounds v. Smith* is inconsistent with the interpretation of *Bounds* applied in almost every other federal circuit court. The legal issues involved in a death-sentenced inmate's right to representation in state post-conviction proceedings affect the interests of all states who provide for capital punishment. The considerations noted by Rule 17, *Rules of the United States Supreme Court*, as indicating special and important reasons for granting certiorari review are evident in this case. The importance of these issues has been recognized by this Court when the case was reconsidered *en banc*. The uncertainty of the resolution of these issues is evidenced by the close division of the Court. The dissenting opinions in this case representing the views of four judges, amply demonstrate that there is substantial question about the majority's resolution of the case and that there is a reasonable probability that certiorari will be granted.

REASONS FOR STAYING THE MANDATE

The defendants may suffer irreparable injury in the absence of a stay of the mandate. Pending resolution of this case on appeal, the district court has permitted its order to be imple-

mented by means of an informal arrangement agreed upon by counsel for the respective parties. This arrangement provides for the state circuit courts to appoint counsel for eligible members of the plaintiffs class upon notification of their intent to seek state post-conviction relief. See Exhibit I to Plaintiffs' Opening Brief (copy of exhibit attached to this Motion). Pursuant to this arrangement, attorneys have been appointed for each inmate who has made a request. Counsel for the defendants have advised plaintiffs' counsel of their willingness to continue this arrangement, pending the resolution of matters in the Supreme Court. The Office of the Attorney General of Virginia has determined as a matter of policy effective immediately to independently advise the appropriate state circuit of the inmate's right to seek appointment of counsel. (Copy of letter attached).

However, upon issuance of the mandate, the judgement of the district court is subject to enforcement. Materials submitted to the district court by plaintiffs in support of a proposed remedy indicate that a formal system of providing legal representation for death row inmates is contemplated. The development and implementation of such a system presents an onerous and expensive obligation on the state and would represent a major restructuring of the state's conduct of the state post-conviction proceedings. The state should not be required to proceed to construct as elaborate mechanism to effectuate this newly declared right when its constitutional necessity is yet to be finally decided.

The defendants do not ignore the interests of the plaintiffs in this matter. This Court has concluded that they are entitled to counsel. Pending resolution of the case in the Supreme Court, the inmates will be provided attorneys, although perhaps not pursuant to the system that the plaintiffs envision as an ultimate remedy.

The defendants submit that the potential harm to the state if required to implement a system provides good cause to issue a stay to permit the review of this case in the Supreme Court.

Pursuant to Rule 41(b), *Federal Rules of Appellate Procedure*, a stay of mandate shall not exceed 30 days unless extended for cause shown. The defendants ask the stay be granted for a period co-extensive with the time for filing the petition for a writ of certiorari.

The petition for a writ of certiorari will present serious and substantial questions to the Supreme Court, and requires the concentrated efforts of counsel. This Court's decision is likely to affect the interests of all states providing for capital punishment. The petition is thus expected to address the impact of this case on other states. New investigation concerning the full scope of this decision is necessary and is being conducted. A complete and proper petition for certiorari in this case requires the full time provided for seeking review in the Supreme Court: 90 days. 28 U.S.C. § 2101(c).

Consideration of the case by the Supreme Court will not be delayed if the stay is granted to permit the full 90 day period from June 3. The Supreme Court will be in summer recess, and therefore unable to review the petition if filed earlier. Extending the stay to include the full time provided by law for filing the certiorari does not prejudice the plaintiffs.

Accordingly, the defendants-appellants move this Court for an order staying the issuance of the mandate until September 2, 1988, within which time the defendants-appellants will file a petition for a writ of certiorari in the United States Supreme Court, and specifying that, upon notification by the Clerk of that Court that the petition has been filed, the stay will remain in effect until final disposition by the Supreme Court.

Respectfully submitted,

EDWARD W. MURRAY, Director,
Virginia Department of Corrections

GERALD L. BALILES, Governor

ROBERT N. BALDWIN

MICHAEL SAMBERG, Warden,
in their official capacities

By: s/ Robert Q. Harris

Counsel

January 30, 1987

TO: CIRCUIT COURT JUDGES
FROM: Robert N. Baldwin
SUBJECT: *Giarratano et al. v. Murray et al.*, Civil Action No. 85-0655-R; Court appointed counsel for indigent death row inmates for habeas corpus proceedings in state courts

On December 18, 1986, the United States District Court for the Eastern District of Virginia directed the Commonwealth to appoint counsel upon request of indigent death row inmates to assist them in pursuing habeas corpus relief in state courts. A copy of the final judgement order in this case is attached for your reference. In connection with this order, the court ordered the various defendants in the case to develop a system for the appointment of attorneys for death row inmates individually.

The effect of this order is to declare a constitutional right on behalf of indigent death row inmates to the appointment of counsel in the state courts should they request appointment of counsel to pursue habeas corpus remedies in state courts. Accordingly, the effect of the opinion is to remove the discretion of circuit court judges regarding such appointments. The scope of the federal court order would include any appeal to the Supreme Court of Virginia in a state habeas corpus proceeding.

Pending further action in this case, the defendants, as officials of the Commonwealth of Virginia, are under an obligation to develop an appropriate system to implement the terms of this order. Failure to fulfill that obligation could be punishable by contempt. Therefore, given an appropriate request by a death row inmate, who is not already represented by counsel in connection with habeas corpus proceedings an attorney should be appointed by the court to represent the inmate for purposes of a habeas corpus proceeding.

As you may be aware, the General Assembly has continued its past practice of appropriating funds with which to compensate attorneys appointed in habeas corpus proceeding in Virginia courts. Accordingly, compensation for attorneys appointed to institute habeas corpus proceeding for death row inmates may

be approved pursuant to item 24, paragraph 3, of Chapter 643 of the 1986 Acts of Assembly. In fixing amounts to be allowed, your attention is directed to the Court-Appointed Counsel Procedures and Guidelines Manual.

Should you have any questions concerning this matter, please do not hesitate to contact me.

Re: (name), capital sentence case

Dear Judge (name) :

By order of the court dated (date), (name) was convicted of capital murder and sentenced to death. On (date), the conviction and death sentence were affirmed by the Virginia Supreme Court.

The purpose of this letter is to inform the Court that it is the position of this Office that, upon request of an inmate under sentence of death, the Circuit Court should appoint counsel to assist the inmate in the initiation of state habeas corpus proceedings. A copy of the recent en banc decision of the United States Court of Appeals for the Fourth Circuit, *Giarratano v. Murray*, is enclosed for the Court's convenience. That decision holds that a death row inmate has a constitutional right to counsel in state habeas proceedings.

By a copy of this letter, both to him and to his present appellate counsel, the inmate in the above-referenced case is being informed that if he does not request counsel, or notify this Court that he already has habeas counsel, within 30 days of the date of this letter, this Office will take immediate steps to have an execution date set.

Please do not hesitate to contact me if the Court has any questions about this Office's position. Thank you for your consideration in this matter.

Respectfully,

cc: (Death row inmate)
(inmate's appellate counsel)
(institutional attorney)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOSEPH M. GIARRATANO, et al.)
Plaintiff-Appellees)

v.) Nos. 87-8718
) 87-8719
)

EDWARD W. MURRAY, Director, et al.)
Defendants-Appellants)

AFFIDAVIT

The affiant, Gerald T. Zerk, states the following as his affidavit, under pains and penalties of perjury:

1. I am co-counsel of record for the plaintiff class in this matter.

2. Following the issuance of the district court's decision in this case, defendant Baldwin issued a memorandum to state circuit court judges advising them of the decision and that counsel should be appointed upon request in death penalty habeas cases. The defendants undertook no other action to effectuate the court's order or to ensure compliance. Dissatisfied with that action, plaintiffs' counsel requested a status conference with Judge Merhige. As a result of that meeting, it was agreed, with the court's concurrence, that relief would be provided pending appeal under an interim arrangement. That arrangement required one of the Assistant Attorneys General representing the defendants, Robert Q. Harris, to advise me whenever a class member had had a death sentence affirmed, or when there was some other event in an individual's case which might entitle them to the assistance of counsel under the court's decision. The arrangement further provided that I would then contact the inmate to advise him of his rights under the court's decision and to determine if he wished to have counsel. If the inmate replied that he did want counsel, I would then write to the appropriate state circuit court judge, reminding him of the defendants' obligations under the court's decision, which had been communicated to the judges by defendant Baldwin, and request that counsel be appointed.

3. The parties have functioned under this interim agreement since March 24, 1987, except during the brief period between the panel decision and the granting of rehearing *en banc*, until the present motion, Mr. Harris has faithfully performed his obligations under the agreement. The defendants have never sought a stay in either the district or the court of appeals.

4. Unfortunately, writing a letter to the circuit court judge has not always been sufficient to secure the appointment of counsel. In several instances, I have had to write and call the judge several times before counsel was appointed. In at least three instances, the judge advised me that he did not have an attorney within his jurisdiction who he believed was prepared to assume the responsibilities or burdens of such a case, and requested that I obtain the names of attorneys who would accept an appointment. When I was aware of attorneys who had indicated a willingness to take on such a case, always attorneys from major firms in the District of Columbia, I complied with the judge's request. On the other hand, when the Attorney General's office received such a request, it advised the circuit court judge that it would represent a potential conflict of interest for it to submit names of attorneys, and, therefore, it declined to do so.

5. Based upon my experience during the last fifteen months, it is clear to me that merely sending a letter to the appropriate circuit court judge will not ensure compliance with the court's decision. It is essential that someone monitor the appointment of counsel, initiate necessary, and sometimes forceful, follow-up communications with the judges, and suggest names of counsel who would be willing to accept appointment when such are available. Absent such monitoring, it is likely that some class members will not receive the relief to which they are entitled under the court's decision.

6. I believe that the defendants' present motion was precipitated by my demand that I be compensated for my time in effecting the defendants' compliance with the court's decision and the expression of my unwillingness to continue to facilitate the defendants' own compliance with the court's decision absent an agreement as to such compensation.

/s/ Gerald T. Zerk

Gerald T. Zerk

EXECUTED UNDER PAINS AND
PENALTIES OF PERJURY

SUPREME COURT OF THE UNITED STATES

NO. 88-411

Edward W. Murray, Director
Virginia Department of Corrections, et al.,
Petitioners

v.

Joseph M. Giarratano, et al.,
Respondents

ORDER entered October 31, 1988

The petition for a writ of certiorari is granted.

NO. 88-411

Supreme Court, U.S.

FILED

DEC 15 1988

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EDWARD W. MURRAY, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS, et al.,
Petitioners,

v.

JOSEPH M. GIARRATANO, et. al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

MARY SUE TERRY
Attorney General of Virginia
H. LANE KNEEDLER
Chief Deputy Attorney General
STEPHEN D. ROSENTHAL
Deputy Attorney General
• ROBERT Q. HARRIS
Assistant Attorney General
FRANCIS S. FERGUSON
Assistant Attorney General

Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-4624

• Counsel of Record

QUESTION PRESENTED

Does the right of "meaningful access to the courts" require the States to provide a personal lawyer to represent each inmate who desires to attack his death sentence in state habeas corpus proceedings?

LIST OF PARTIES

The parties to the proceedings below were the petitioners before this Court, Edward W. Murray, Director of the Virginia Department of Corrections, Gerald L. Baliles, Governor of the Commonwealth of Virginia, Robert N. Baldwin, Executive Secretary of the Supreme Court of Virginia, and Michael Samberg, Warden of the Virginia State Penitentiary, and the respondents, Joseph M. Giarratano, Johnny Watkins, Jr. and Richard T. Boggs, inmates confined in the Virginia Department of Corrections under sentence of death. Watkins and Boggs are named representatives of a class of death row inmates.

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No. 88-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EDWARD W. MURRAY, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS, et al.,
Petitioners,

v.

JOSEPH M. GIARRATANO, et al.,
Respondents.

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The Opinion of the *en banc* Court of Appeals for the Fourth Circuit (Pet. App. A-1-8) is reported at 847 F.2d 1118. The memorandum opinion of the United States District Court for the Eastern District of Virginia (Pet. App. A-23-33) is reported at 668 F.Supp. 511.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on June 3, 1988. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The petition for a writ of certiorari was filed on August 31, 1988, and was granted on October 31, 1988.

STATEMENT OF THE CASE

Joseph M. Giarratano, a Virginia prisoner under sentence of death, initiated this civil rights action pursuant to 42 U.S.C. § 1983, by a *pro se* complaint filed in the district court on July 3, 1985. By Order of May 29, 1986, the district court certified a class consisting of:

all persons, now and in the future, sentenced to death in Virginia, whose sentences have been or are subsequently affirmed by the Virginia Supreme Court and who either (1) cannot afford to retain and do not have attorneys to represent them in connection with their post-conviction proceedings, or (2) could not afford to retain and did not have attorneys to represent them in connection with a particular post-conviction proceeding.

(J.A. 32). Thirty-two inmates were confined in Virginia under sentence of death at the time of trial.¹ Only one inmate did not then have counsel. (J.A. 165).

The inmate plaintiffs asserted a constitutional entitlement to representation by counsel in state and federal post-conviction challenges to their convictions and death sentences. They based the asserted right on the Equal Protection and Due Process provisions of the Fourteenth Amendment, the Sixth Amendment, the Eighth Amendment, Article I, and the right of access to the courts.

¹ Fifteen inmates have had death sentences imposed and affirmed on direct appeal since the trial of this action.

The case was tried on July 10 and 11, 1986. By Order and Opinion of December 18, 1986, the district court determined that the inmates were entitled to attorneys upon request to represent them in the preparation, filing, and prosecution of state habeas corpus actions. (Pet. App. A-23). The court based its ruling on the right of meaningful access to the courts as expressed in *Bounds v. Smith*, 430 U.S. 817 (1977). (Pet. App. A-25).

Legal Assistance Available in Virginia

Virginia death row inmates are confined primarily at the Mecklenburg Correctional Center ("Mecklenburg"). On occasion, a few are housed at the Powhatan Correctional Center ("Powhatan") or the Virginia State Penitentiary ("Penitentiary"). Virginia prisoners have access to legal information and assistance from three sources provided by the state: institutional law libraries, institutional attorneys, and court-appointed attorneys.

Institutional Law Libraries:

Each of the institutions housing death-sentenced inmates maintains a law library. (J.A. 336, 341, 347). Regulation of physical access to the libraries varies at the institutions. Mecklenburg death row inmates are permitted two half-day periods weekly (J.A. 265, 322); death row inmates at Powhatan and the Penitentiary are not permitted to visit the libraries, but may have legal material brought to them in their cells. (J.A. 333, 346).

The libraries provide the inmates with court decisions, court rules and state statutes. The libraries also contain copies of the annotated United States Code and federal rules, as well as reported federal cases. Law dictionaries are provided, as are treatises concerning criminal law and procedure, self-help manuals for prisoners, and forms for filing habeas corpus actions. (J.A. 336, 341, 347).

The plaintiffs did not challenge the contents of the institutional law libraries at trial. Inmate Watkins, who had visited the Mecklenburg library "about twice," complained of the lack of

assistance from a clerk. (J.A. 123, 126). Inmate Giarratano also commented on the lack of skills of the library clerk, but he described the library as "decent." (J.A. 207). A library "annex" was created for the death row inmates at Mecklenburg in 1985 to provide additional general reference materials for the prisoners in their cell area. The annex was later removed, at the inmates' request. (J.A. 315, TR. 410).

Institutional Attorneys:

Pursuant to Virginia Code § 53.1-40, attorneys have been appointed for each institution to "counsel and assist indigent prisoners therein confined regarding any legal matter relating to their incarceration." (J.A. 302, 304, 331, 335, 340, 344-45). The appointment and compensation of the institutional attorneys is under the authority of the circuit court where the prison is located. (J.A. 304). The attorneys are independent of the Department of Corrections.

The institutional attorneys are available to assist the inmate in the preparation of habeas corpus petitions by: obtaining the records concerning the trial, including the trial transcript, appellate briefs, and orders; reviewing the record of the trial and other proceedings with the inmate to help identify and develop claims; providing the inmate with copies of legal materials, or conducting legal research for the prisoners; and drafting petitions for the inmate to review and file *pro se*. (J.A. 218-19, 234).

The legal assistance provided by the unit attorneys does not include acting as counsel of record -- the attorneys do not sign the documents as counsel and do not appear in court on behalf of the inmates. (J.A. 219-20, 251). Other attorneys are provided for court proceedings. (J.A. 302).

No requests for legal assistance from the institutional attorneys have been made by death row inmates at the Penitentiary. (J.A. 182, 258). Only one such request was received from a Powhatan death row inmate, and the assistance requested was provided. (J.A. 221, 223-24). None of the institutional attorneys at Mecklenburg, Powhatan, or the Penitentiary has been asked to research and prepare a petition for a writ of habeas corpus

for any death row inmate. (J.A. 182, 221, 230, 231, 232, 258). The institutional attorneys regularly prepare petitions for other inmates when requested to do so. (J.A. 220, 235, TR. 373).

One of the institutional attorneys at Mecklenburg testified that few requests have been made for assistance from the death row inmates. The attorney has conducted legal research upon request (J.A. 235); he has prepared motions for extensions of time (J.A. 232-33); he began work on a certiorari petition for inmate Edmunds before the inmate obtained volunteer counsel (J.A. 237-38); he collected materials for review in preparing a habeas corpus petition for inmate Richard Boggs (J.A. 236-37); he prepared motions to stay mandates (J.A. 249); and he has assisted death row inmates with civil rights actions brought under 42 U.S.C. § 1983 (J.A. 229). The attorney estimated that he had prepared fifty or more habeas corpus petitions for other Mecklenburg inmates since his November 1983 appointment. (J.A. 235).

This attorney collected information concerning capital punishment and the death sentencing process for his library, in addition to the resources available at the institution. (J.A. 238-39). Since 1985, he has monitored the status of the post-conviction litigation of death row inmates at Mecklenburg. (J.A. 228, 233). No death row inmate at Mecklenburg has ever asked the institutional attorney to prepare a petition for a writ of habeas corpus. (J.A. 229-30). The attorney considers himself obligated to prepare such petitions if asked, and he is willing to provide such assistance. (J.A. 231, 236).

Two Mecklenburg inmates testified that the unit attorney had failed to provide assistance upon request. Inmate Watkins asked the attorney to help him obtain a transcript of his trial. At the time of the request, Watkins was represented by counsel on his direct appeal, and he was advised to contact his attorneys to obtain transcript. (J.A. 119, 122-23).

Inmate Giarratano acknowledged that the institutional attorneys come to the death row unit when they receive a request from an inmate. (J.A. 204). Giarratano has referred other inmates to these attorneys, but not specifically for the purpose of preparing a habeas corpus petition. (J.A. 209). Giarratano testified that the unit attorneys had advised him that they could not draft pleadings and could not represent inmates (J.A. 209, 212),

although he was aware of at least one instance when an institutional lawyer prepared a motion for another inmate. (J.A. 210). According to Giarratano, the inmates are aware of the unit attorneys, but their understanding is that the attorneys do not draft petitions and do not represent inmates. (J.A. 212).

The Mecklenburg attorney became aware of the death row inmates' perception that the unit attorneys did not draft petitions during his review of materials submitted in connection with this case. (J.A. 236). His impression was that inmates learn soon after they arrive that the other death row inmates have attorneys who have been privately recruited. The inmates then look to this volunteer system for help in their own cases. (J.A. 235-36).

Representation by Counsel:

Counsel is provided for all indigent defendants accused and convicted of capital crimes in Virginia at trial and on the mandatory direct appeal to the Virginia Supreme Court. Va. Code §§ 19.2-159, 19.2-326. Virginia statutory law does not require the appointment of counsel to represent inmates in the initiation of collateral attacks on state court judgments. Virginia courts have the authority however, to appoint counsel to represent any indigent inmate in a habeas corpus proceeding. Va. Code § 14.1-183. Such appointments are discretionary with the court and have been made, upon request, prior to the filing of any petition. Attorneys so appointed are compensated by the state. As a matter of state practice, the Virginia Supreme Court has ruled that counsel must be appointed to represent a habeas corpus petitioner who presents non-frivolous claims requiring a hearing. *Darnell v. Peyton*, 208 Va. 675, 160 S.E.2d 749 (1968).

All death row inmates in Virginia have had the assistance of an attorney, whether volunteer or court-appointed, in pursuing state habeas corpus remedies. Each inmate executed in Virginia under the present capital punishment statutes has had counsel available for all habeas corpus actions prior to his execution.

Virginia death row inmates not already represented by volunteer or retained lawyers have sought appointment of counsel on only two occasions. On both occasions, the request for

appointed counsel was granted. (J.A. 325, 353). There is no evidence of a shortage of attorneys willing to accept court appointments.

The Circuit Court of Fairfax County, "on motion of" Richard Whitley, appointed Robert Hall to represent Whitley in the preparation and prosecution of his state habeas corpus action. (J.A. 109, 353). Hall and his associates prepared the petition, conducted the hearing, and prepared the appellate materials. (J.A. 110).

The Circuit Court of York County appointed Alan Clarke and Lloyd Snook to represent death row inmate Willie Leroy Jones. (J.A. 196). The state judge was approached by one of the attorneys who advised the court of his willingness to represent Jones if appointed. The state judge agreed to appoint the attorney, although the formal motion for appointment was tendered and granted after the filing of the petition. (J.A. 325, 328).

Since the enactment of the present Virginia capital punishment statutes in 1976, death row inmates have chosen to rely primarily on volunteer attorneys for assistance in their post-conviction efforts to challenge their convictions and sentences. Beginning in 1983, the Virginia Coalition on Jails and Prisons was formed to monitor the status of Virginia death row inmates and to locate volunteer attorneys willing to represent these inmates in legal proceedings to challenge their sentences after direct appeal. (J.A. 154). Marie Deans, Executive Director of the Coalition, has worked with inmate Joseph Giarratano, and attorneys who had previously represented death row inmates, to recruit lawyers to represent fifteen death row inmates between 1983 and the time of trial. (J.A. 155-56, 157, 159-162). Ms. Deans is not an attorney and the Coalition is not an agency of the Commonwealth.

Ms. Deans experienced increasing difficulty in obtaining volunteer counsel for the inmates. (J.A. 157). She was unable to locate an attorney to file certiorari petitions for one inmate, and the petitions were prepared by inmate Joseph Giarratano. (J.A. 164). She also initially was unable to locate volunteer counsel to prepare a state habeas corpus petition for inmate Earl Washington. Plaintiffs' counsel in this action prepared the petition for Washington. (J.A. 162).

The Decisions Below

The district court concluded that law libraries do not provide these inmates with meaningful access to the courts, citing three considerations: the limited amount of time death row inmates may have to prepare and present their petitions; the complexity and difficulty of the legal work; and the stress on an inmate's mental functions caused by the fact of a death sentence. (Pet. App. A-26). The district court did not question the adequacy of the institutional law libraries in any respect.

The district court also concluded that the assistance provided by unit attorneys is inadequate for these plaintiffs. In part, the district court relied on the limitations imposed by reason of the attorneys' workloads. At the time of trial, seven attorneys provided legal assistance for approximately 2000 inmates. The attorneys appointed to the institutions maintain private practices in addition to their work at the institutions. Testimony at trial indicated that an institutional attorney would find it difficult to handle more than one capital case at a time. (Pet. App. A-27). The district court also concluded that the scope of that assistance was too limited even if additional institutional attorneys were appointed. In particular, the court noted the lack of factual investigation that could be conducted, and the fact that such attorneys do not sign pleadings or appear in court. (Pet. App. A-28).

The district court rejected the availability of court-appointed attorneys as an adequate method of assuring the inmates of access to the courts. According to the district court, the timing of such appointments was too late. The district court interpreted the authority of the Virginia courts to appoint counsel as limited only to situations in which a petition had been filed raising non-frivolous claims. (Pet. App. A-28-29).

The district court ruled that meaningful access to the courts for these inmates could be provided only by "the continuous services of an attorney to investigate, research and present claimed violations of fundamental rights." 668 F. Supp. at 514 (Pet. App. A-28). The pool of attorneys willing to volunteer to represent death row inmates in collateral attacks on their death sentences was determined to be insufficient to meet the needs of

these inmates. The state defendants were ordered to "develop a system whereby attorneys may be appointed to the death row inmates individually." 668 F. Supp. at 517 (Pet. App. A-23). The injunctive relief ordered, however, was limited to *state* post-conviction proceedings.

The defendants appealed to the United States Court of Appeals for the Fourth Circuit, and the plaintiffs cross-appealed. A split panel of the Fourth Circuit reversed the district court's judgment that the state was constitutionally required to provide personal attorneys to represent death row inmates in state collateral proceedings. On rehearing *en banc*, however, the district court's judgment was affirmed by a 6-4 vote. The *en banc* decision, like that of the district court, limited the relief to *state* habeas corpus proceedings and expressly rejected the plaintiffs' contention that their right of access required counsel for federal habeas corpus proceedings as well. 847 F.2d at 1122 (Pet. App. A-8).

SUMMARY OF ARGUMENT

The Fourth Circuit majority has created a right to counsel for the plaintiff inmates where none is required by the Constitution. In reaching this result, the court below disregarded the clear statements of this Court in three distinct areas that recognize the limited reach of the Federal Constitution in post-conviction proceedings affecting state prisoners. In each instance, the court below has ignored or obliterated the lines established by this Court concerning the States' constitutional obligations to prisoners who wish to pursue post-conviction collateral remedies.

1. In *Pennsylvania v. Finley*, this Court found no constitutional right to counsel in post-conviction proceedings, and recognized the limited command of the Constitution in such proceedings. The reasons that this Court identified in *Finley* for limiting the right to counsel to criminal prosecutions and direct appeals are equally evident here. The consequences of a constitutional right to counsel in such proceedings also are readily apparent. This Court has recognized that a constitutionally-mandated right to counsel carries with it a right to effective assistance of counsel. A right to post-conviction counsel will undoubtedly spawn collateral challenges to the effectiveness of habeas counsel.

2. In *Barefoot v. Estelle*, and subsequent cases, this Court has specifically rejected the premise that a post-conviction challenge to a death sentence has a preferred constitutional status. The decision of the court below is nevertheless based on the premise that inmates attacking death sentences are entitled to more consideration in state habeas corpus actions than is required for other prisoners challenging non-capital convictions. This Court, however, has consistently refused to impose additional procedural requirements on the States once a capital case has progressed beyond the trial stage.

3. In *Bounds v. Smith*, this Court articulated a right of access to the courts, but did not require the States to provide the inmate with the equivalent of a personal attorney to represent him in habeas corpus actions, state or federal. The legal assistance which Virginia has made available to these inmates far exceeds the level of assistance which this Court has held sufficient to satisfy the Constitution.

In short, this Court's decisions recognize the important interests of comity and finality intrinsic to all post-conviction actions. Those interests were ignored by the court below, thereby jeopardizing the ability of Virginia to enforce its judgments. The court below has simply preempted the State's legislative prerogative and has substituted its judgment of what it considers a desirable policy in state post-conviction proceedings.

ARGUMENT

THE CONSTITUTION DOES NOT REQUIRE STATES TO PROVIDE COUNSEL TO REPRESENT INMATES WHO DESIRE TO CHALLENGE DEATH SENTENCES IN STATE HABEAS CORPUS PROCEEDINGS.

A. The State's Obligation to Provide Counsel Extends to the First Appeal of Right and No Further.

The courts below have created a federal constitutional right to counsel for a particular class of inmates for a single type of state-court proceeding. This entitlement requires Virginia to provide counsel if the inmate is indigent and if he expresses a desire to challenge his death sentence in a state habeas corpus action.

This Court has consistently held, however, that the constitutional right to appointed counsel extends to the first appeal of right and no further. *Wainwright v. Torna*, 455 U.S. 586 (1982); *Ross v. Moffitt*, 417 U.S. 600 (1974). There is no constitutional right to counsel for state post-conviction attacks on state criminal convictions. *Pennsylvania v. Finley*, 107 S.Ct. 1990, 1993 (1987).

A prisoner seeking to challenge his conviction in a habeas corpus action already has received the full panoply of protections afforded by a legal system that makes individual rights its highest priority. The accused in a criminal prosecution is provided a host of protections designed to ensure fairness and a just result. Fundamental fairness requires counsel as a safeguard of those rights, and Virginia honors these requirements in all criminal prosecutions.

In capital cases, moreover, certain additional substantive and procedural safeguards are provided. Virginia law limits capital murder to a narrowly defined class of eight offenses. Va. Code § 18.2-31. The trial proceedings are bifurcated to permit the appropriate consideration of the separate issues of guilt and punishment. Va. Code § 19.2-264.3. In the sentencing phase, appropriate measures are taken to assure that the sentencer will consider all relevant factors concerning the defendant and his

sentence. Va. Code § 19.2-264.4(B). A defendant is provided a virtually unlimited opportunity to offer evidence in mitigation of punishment. *Briley v. Bass*, 750 F.2d 1238 (4th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985).

Once a defendant has been convicted of capital murder, the Commonwealth's ability to obtain a death sentence is also carefully circumscribed. The prosecutor must prove beyond a reasonable doubt specific aggravating circumstances before a death sentence may be imposed. Va. Code § 19.2-264.4(C). The jurors must be unanimous on the sentence of death, and if they cannot agree, the defendant is automatically sentenced to life imprisonment. Va. Code § 19.2-264.4(D) and (E). Even if the Commonwealth's burden is met, the jury remains free to impose a life sentence, and if it does not, the trial judge still may reduce the penalty to life imprisonment after an independent review. Va. Code § 19.2-264.5. Virginia law thus provides all the safeguards which the Constitution requires for the imposition of a death sentence.

Similarly, when a state provides for an appeal of a criminal conviction, counsel must be provided for the first appeal of right. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Douglas v. California*, 372 U.S. 353 (1963). In Virginia, a mandatory appeal is provided to the Virginia Supreme Court in death penalty cases. The appeal is automatic, unlike the process in non-capital cases, and is given priority over all other appeals. Va. Code §§ 17-110.1 and 110.2. The Virginia Supreme Court is required to conduct an independent review of the sentence to determine if it is excessive, disproportionate, or arbitrarily imposed. Va. Code § 17-110.1(C)(1) and (2). The proportionality review conducted by the Virginia Supreme Court exceeds what the Constitution requires. *See Pulley v. Harris*, 465 U.S. 37, 50-51 (1984) (proportionality review not constitutionally mandated in appellate review of capital cases).

Once the direct appeal is over, however, the constitutional obligation of the State to provide counsel ends. By the time the capital defendant has completed his trial and direct appeal, he has received the benefit of the full arsenal of procedural rights, all safeguarded by his right to counsel. Direct appeal is the primary avenue for review of a conviction or sentence. After the process of direct review is complete, state court criminal judgments

are presumed final and valid. *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). In the context of a capital trial and its heightened procedural safeguards, that presumption is truly earned.

"The writ of habeas corpus indisputably holds an honored position in our jurisprudence," but it also "entails significant costs." *Engle v. Isaac*, 456 U.S. 107, 126 (1982). Those costs have been well articulated by this Court. By extending "the ordeal of trial for both society and the accused," collateral review of a criminal conviction "undermines the usual principles of finality of litigation." *Id.* at 127. See also Bator, *Finality in Criminal Litigation and Federal Habeas Corpus for State Prisoners*, 76 Harv.L.Rev. 441 (1963). "Liberal allowance of the writ . . . degrades the prominence of the trial itself," and issuance of the writ "frequently cost[s] society the right to punish admitted offenders." *Isaac*, 456 U.S. at 127.

Habeas corpus is not an occasion to relitigate the state court trial, and its role is secondary and limited. *Barefoot*, 463 U.S. at 887. A habeas corpus action is not part of the criminal adjudication process. See *Fay v. Noia*, 372 U.S. 391, 423-24 (1963).

Virginia courts recognize the appropriate function of the writ of habeas corpus. "A prisoner is not entitled to use habeas corpus to circumvent the trial and appellate processes for an inquiry into an alleged non-jurisdictional defect of a judgment of conviction." *Slayton v. Parrigan*, 215 Va. 27, 30, 205 S.E.2d 680, 682 (1974), cert. denied sub. nom. *Parrigan v. Paderick*, 419 U.S. 1108 (1975).

Thus, while state habeas corpus proceedings offer a prisoner an opportunity to challenge his conviction, a State is not independently obligated to provide habeas corpus review to confirm the validity of the state court judgment. The trial is still the "main event." *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

In *Ross v. Moffitt*, this Court emphasized that there is a significant difference between the role of counsel on appeal and at trial. Appellate counsel no longer acts as the shield to protect the defendant's trial rights. He serves instead as a sword in an attempt to upset a prior determination of guilt. While a state may not dispense with the trial proceedings, the Constitution does not obligate the States to provide any appeal. Having provided an

appeal, the State is not also obligated to provide counsel at every step in the appeals process. *Ross*, 417 U.S. at 610-611.

A habeas corpus proceeding is obviously even further removed from the trial than an appeal. The prisoner's objective is to invalidate a judgment which already has been the subject of direct review and is presumptively valid and final. The additional concern of a need for finality, and the limited function of the writ of habeas corpus, give the considerations articulated in *Ross* even greater force in this arena. As the Court held in *Finley*:

States have no obligation to provide [habeas corpus] relief, . . . and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well.

107 S.Ct. at 1994 (citation omitted).

The underlying theory for the inmates' claims in this action is no different than that addressed in *Finley*, i.e., a federal constitutional right to counsel for state post-conviction proceedings. The reasons why the States' obligation to provide counsel extends no further than the first appeal of right, however, are as evident here as they were in *Finley*.

B. A Right To Post-Conviction Counsel For Death
Row Inmates Is An Unwarranted And Dangerous
Intrusion Into A Matter Committed To The
Discretion Of The States.

The consequences of the right which the courts below have created are readily apparent. The attorney who unsuccessfully represents a death row inmate in a post-conviction proceeding, like the attorney who defended the inmate at trial, will become the focus of yet another round of post-conviction challenges. This Court has recognized that the right to counsel, if constitutionally mandated, carries with it the right to effective counsel. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985); *Strickland v. Washington*, 466 U.S. 668, 686 (1984); cf. *Pennsylvania v. Finley*, 107 S.Ct. at 1994.; *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982).

The Fourth Circuit majority's ruling, if allowed to stand, will no doubt provoke an endless succession of collateral proceedings in which the petitioner invokes a right to counsel to challenge the effectiveness of the next previous attorney.

Although the new right to post-conviction counsel does not appear to arise from the Sixth Amendment, it will presumably carry with it some entitlement to "effective assistance." Provision of the counsel on constitutional grounds also brings with it a panoply of procedural requirements. . . . It is hard to imagine a more fertile ground for litigation than that provided by these entitlements. *The likely result will be additional cycles of prisoner litigation in every capital case, each ever further removed from the proper focus of criminal adjudication -- the trial itself.*

847 F.2d at 1125 (emphasis added) (Wilkinson, J., dissenting and concurring). "The result is akin to the effect created when a mirror is held facing another mirror, the image repeating itself to infinity." *Evitts v. Lucey*, 469 U.S. at 411 (Rehnquist, J., dissenting).

Virginia's legitimate interest in the finality of its judgments, already threatened by repetitive post-conviction litigation, will be further jeopardized by a finding of a constitutional entitlement to post-conviction counsel. Finality becomes impossible if every post-conviction proceeding produces the opportunity for still more collateral challenges to the adequacy of previous post-conviction counsel. The strong state interest in the enforcement of presumptively valid judgments is reduced to a meaningless phrase without an enforceable concept of finality.

The creation of a right to counsel for death row inmates is also certain to encourage other inmates to assert that they too have difficult and complex claims which require the assistance of counsel. The capital defendant who receives multiple life sentences, for example, is faced with the same type of issues identified by the courts below, but he is not given counsel under the district court and Fourth Circuit opinions. That his need could be as great or greater than that asserted by the class in this case simply demonstrates the arbitrariness of the actions of the courts below.

This unwarranted and unprecedented federal intrusion into a matter peculiarly committed to the States' authority -- state post-conviction review of a state criminal judgment -- "disregards the independence of state judicial systems and the respective spheres of legislative and judicial competence." 847 F.2d at 1123. (Wilkinson, J., dissenting and concurring). This Court has repeatedly stressed the interests of the State in the enforcement of its criminal laws in the context of federal habeas corpus review of state court criminal convictions. The exhaustion requirement of the federal habeas corpus statute, *see* 28 U.S.C. § 2254(b) and (c), the deference to state court factual findings, *see* 28 U.S.C. § 2254(d), and the enforcement of state court procedural rules, *see Wainwright v. Sykes*, 433 U.S. 72 (1977), all reflect an overriding respect in our federal system for the state's interest in its criminal judgments. That interest is certainly paramount to any federal interest which has been identified in this case.

The premise that the *Federal* Constitution dictates the precise form that state post-conviction proceedings should assume has been specifically rejected by this Court: "On the contrary, in this area the States have substantial discretion to develop and implement programs to aid prisoners seeking to secure post-conviction review." *Finley*, 107 S.Ct. at 1995. The discretion recognized by this Court in *Finley* has little meaning if the State is to be held to some federally-imposed model. The effect of this intrusion, as Judge Wilkinson noted in dissent below, is that "[s]tate post-conviction remedies will now move one step closer to the status of a federal protectorate." 847 F.2d at 1125.

The Fourth Circuit majority and the district court below have created an entitlement to a personal lawyer for death row inmates in state court collateral proceedings, but have not granted such a right for federal habeas corpus actions involving the same inmates challenging the same convictions and sentences. Thus, the lower courts in this case have been willing to thrust upon the Commonwealth of Virginia a system which they are unwilling or unable to force upon the federal government. The remarkable and unprecedented result is that the Federal Constitution is deemed to require greater protection for a state inmate in state court than for the same inmate in federal court.

Even more remarkable is the fact that this new entitlement is

based solely on the preferences of the prisoners, not any demonstrable failure of an existing state system to provide legal assistance. The available sources of legal assistance for death row inmates -- institutional law libraries, institutional attorneys and court-appointed attorneys -- provide ample assurance that each inmate will have an adequate opportunity to identify and present his claims in a petition for habeas corpus relief if he chooses to do so.

Thirty-seven States and the federal government provide for application of the death penalty as a permissible punishment for the most serious crimes. Plaintiffs estimated at trial that two-thirds of the States with capital punishment statutes do not provide lawyers as a matter of right for inmates seeking relief from their sentences in state post-conviction actions. If the decision below requiring the automatic provision of personal counsel to represent each death row inmate in state post-conviction proceedings is permitted to stand, all states which administer a system of capital punishment must expect challenges to their post-conviction procedures on the basis of this newly-found constitutional right to counsel. The second wave of litigation to challenge the *effectiveness* of habeas counsel in capital cases would never end. As the plaintiffs have advised this Court (Br. Opp. 15, 22), the decision of the Fourth Circuit is the *first* to address this issue. If the decision below is upheld, it most certainly will not be the last.

C. Inmates Under A Sentence Of Death Are Not Entitled To A Preferred Constitutional Status In Post-Conviction Proceedings.

Attempting to distinguish *Finley*, the Fourth Circuit majority cited the "significant constitutional difference between the death penalty and lesser punishments," 847 F.2d at 1122 (Pet. App. A-7), and concluded that the nature of the penalty constitutionally requires the appointment of counsel. Thus, the Fourth Circuit has plainly created a special category of habeas corpus cases distinguished only by the nature of the penalty imposed upon the litigant. This Court, however, has specifically rejected

the proposition that the fact of a death sentence entitles a prisoner to a preferred status in post-conviction matters.

A death sentence is not inherently suspect. To the contrary, the many procedural protections constitutionally required for capital trials and sentencing are designed for purposes of assuring a reliable and accurate determination by the sentencer that death is the appropriate penalty in a particular case. A conviction and sentence upheld on direct review is entitled to a presumption of finality and legality, and "*death penalty cases are no exception*", *Barefoot v. Estelle*, 463 U.S. at 887 (emphasis added).

The qualitative difference between death and other punishments has been recognized by this Court as calling for "a greater degree of reliability *when the death sentence is imposed*." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis added) (Burger, C.J.). This concern, grounded in the Eighth Amendment, requires capital sentencing procedures *at trial* designed to minimize the risk that the penalty will be imposed in an arbitrary and capricious manner. *Zant v. Stephens*, 462 U.S. 862, 876-77 (1983). The Court has emphasized its "twin objectives" of "measured, consistent application and fairness to the accused." *Spaziano v. Florida*, 468 U.S. 447, 459 (1984). Thus, the sentencing procedures at trial must provide a means to rationally identify those for whom the penalty is appropriate. *Zant*, 462 U.S. at 878-880, and must permit the sentencer to consider the individual circumstances of the defendant and his crime. *Lockett*, 438 U.S. at 605.

The death penalty, however, does not require special or additional protection for the capital defendant in every matter affecting his trial and sentencing. See, e.g., *Spaziano v. Florida*, 468 U.S. at 460 ("[T]here certainly is nothing in the safeguards necessitated by the Court's recognition of the qualitative differences of the death penalty that *requires* that the sentence be imposed by a jury."); *Pulley v. Harris*, 465 U.S. at 50-51 (rejecting a requirement of comparative proportionality review on state appeals of death sentences).

This Court has considered and repeatedly rejected efforts by death row prisoners to obtain a preferred status in mounting collateral attacks on their convictions and sentences. Neither the "qualitative difference" of the death penalty, nor any constitu-

tional provision, has been deemed to warrant different treatment for capital cases in post-conviction proceedings.

Procedural default rules apply in capital habeas proceedings in the same way as in non-death penalty cases. *Smith v. Murray*, 477 U.S. 527, 538 (1986). Likewise, there is no different standard for post-conviction evaluation of the effective assistance of counsel in death penalty cases. *Strickland v. Washington*, 466 U.S. at 687. In *Barefoot v. Estelle*, 463 U.S. at 893, the Court rejected the provision of an automatic certificate of probable cause to appeal federal habeas cases involving the death penalty.

Five members of this Court joined in a *per curiam* opinion to state emphatically that violations of Rule 9(b) of the Rules Governing 28 U.S.C. § 2254 Cases (abuse of the writ) should not be tolerated by the federal courts, even in capital cases. *Woodard v. Hutchins*, 464 U.S. 377, 380 (1984) (*per curiam*) (Powell, J., concurring). In *Autry v. Estelle*, 464 U.S. 1 (1983) (*per curiam*), the Court refused to adopt a rule that would grant an automatic stay in capital cases "regardless of the merits of the claims presented," even when "the applicant is seeking review of the denial of his first habeas corpus petition." *Id.* at 2.²

This Court's decisions demonstrate conclusively that, in the context of a collateral attack, the nature of the penalty does not alter the nature of the proceedings. There is simply no basis in this Court's decisions to support the separate habeas corpus scheme contemplated by the courts below.

² In *Ford v. Wainwright*, 477 U.S. 399 (1986), the Court held that execution of an insane person was not permitted by the Eighth Amendment. The Court did not specify what procedures were necessary to make the sanity determination. Five members of the Court, however, explicitly rejected the concept that the strict procedural requirements that surround a capital trial should apply in a post-conviction proceeding. As Justice Powell noted in his concurring opinion, "[T]his Court's decisions imposing heightened procedural requirements on capital trials and sentencing proceedings . . . do not apply in this context." 477 U.S. at 425.

D. The Right of Meaningful Access to the Courts Does Not Provide a Right To Counsel For Post-Conviction Proceedings.

This case was decided on the basis of the constitutional right of access to the courts. The courts below rejected the means of providing legal assistance to inmates that Virginia has chosen and instead ordered the state to provide the appointment of personal counsel to represent death row inmates upon request. This requirement is not warranted either by law or by the facts of this case.

The Fourth Circuit attempted to avoid the clear import of *Finley* by focusing on the fact that the *Finley* opinion did not expressly refer to *Bounds v. Smith*. In the plainest language, however, the Court acknowledged that *Finley* had not been denied "meaningful access" as a result of her counsel's conduct. 107 S.Ct. at 1994. In *Ross v. Moffitt*, the Court concluded that "meaningful access" to discretionary appellate review did not require the state to provide counsel. 417 U.S. at 614-15. In *Finley*, the Court explicitly stated that "the same conclusion [as in *Ross*] necessarily obtains with respect to post-conviction review." 107 S.Ct. at 1994.

In *Bounds v. Smith*, this Court addressed the question of "whether states must protect the right of prisoners to access to the courts by providing them with law libraries or alternative sources of legal knowledge." 430 U.S. at 817. The Court concluded that state prisoners have a constitutional right of access to the courts, and the States have an affirmative obligation to assure that such access is meaningful. The Court specifically held that the obligation of the States is to "assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." 430 U.S. at 828.

The specific holding in *Bounds* and the historical context of the right of access demonstrate the limited nature of the right.³ As the Eleventh Circuit observed:

³ The right of access to the courts was first expressed in *Ex parte Hull*, 312 U.S. 546 (1941), when the Court invalidated a prison regulation prohibiting inmates from filing petitions for writs of habeas corpus without first submitting

Having held that inmates can represent themselves, if able to do so, and can help other inmates who are not so able, it was but a small step to hold that such able inmates, who presumably would have access to libraries but for imprisonment, must be given access to libraries in prison, or access to people who have access to libraries. This is a far cry from constitutionally requiring the state to provide legal counsel for the imprisoned, not available as a matter of constitutional right to the unimprisoned in civil cases.

Hooks v. Wainwright, 775 F.2d 1433, 1436-37 (11th Cir. 1985), cert. denied, 107 S.Ct. 313 (1986) (Florida plan for providing prisoners access does not require attorney assistance).

Bounds did not suggest that the States' obligation to provide legal assistance to inmates included providing a personal lawyer to represent inmates. The appointment of counsel to represent inmates was mentioned only as an independent issue, and by specifically referring to *Ross v. Moffitt* and *Johnson v. Avery*, the Court underscored the conclusion that there is *no* obligation on state and federal courts to appoint counsel for inmates who

the pleadings to a state official to determine if they were "properly drawn". The Court held that "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." 312 U.S. at 549. Subsequently, the Court has struck down various restrictions imposed upon prisoners which had the effect of preventing inmates from presenting their claims of constitutional deprivations to the courts. *Griffin v. Illinois*, 351 U.S. 12 (1956) (trial records for inmates who cannot afford to buy them); *Burns v. Ohio*, 360 U.S. 252 (1959) (payment of docket fees by indigent prisoners); *Johnson v. Avery*, 393 U.S. 483 (1969) (regulation prohibiting assistance of other inmates in preparing petitions); *Younger v. Gilmore*, 404 U.S. 15 (1971) (per curiam), aff'g *Gilmore v. Lynch*, 319 F.Supp. 105 (N.D.Cal. 1970) (prison regulations restricting inmates' access to libraries); *Procunier v. Martinez*, 416 U.S. 396 (1974) (regulations restricting inmate access to law students); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (regulations restricting assistance of other inmates for civil rights actions). This Court has never construed the "right to meaningful access" to include a right to counsel for post-conviction proceedings.

indicate an intention to seek post-conviction relief.⁴ Rather, the right of "meaningful access to the courts" imposes a limited obligation on the States to make some source of legal assistance available to provide inmates a "reasonably adequate opportunity to present claimed violations of fundamental constitutional rights." 430 U.S. at 825.⁵

The notion that the access right is to be measured against the assistance that might be provided an inmate by a personal lawyer has no support in *Bounds*. Indeed, the idea is entirely inconsistent with the limited nature of the right. The efforts of the courts below to elevate the right of access to the level of a right to counsel ignores the limited scope of the right identified in *Bounds*. By giving the right such an expansive reading, the courts below have granted what this Court specifically denied in *Finley* - a right to counsel for post-conviction proceedings.

E. Virginia Provides Death Row Inmates Legal Assistance That Exceeds Its Constitutional Obligation To Assure Meaningful Access To The Courts.

Virginia has chosen to provide inmates with legal assistance in *both* forms specifically held in *Bounds* to satisfy the State's

⁴ The Court noted that "[c]ourts may also impose additional burdens before appointing counsel for indigents in civil cases." *Bounds*, 430 U.S. at 826 n.15. That the right of access does not provide a basis for requiring representation by appointed counsel for post-conviction proceedings had been established in *Johnson v. Avery*:

It has not been held that there is any general obligation of the courts, state or federal, to appoint counsel for prisoners who indicate, without more, that they wish to seek post-conviction relief.

393 U.S. at 488.

⁵ This description of the right of meaningful access has been consistently employed by this Court. See *Procunier v. Martinez*, 416 U.S. at 419 ("reasonable opportunity to seek and receive" assistance); *Ross v. Moffitt*, 417 U.S. at 616 ("adequate opportunity to present claims fairly"); *Wolff v. McDonnell*, 418 U.S. at 579 ("opportunity to present").

obligations, *as well as* the opportunity to have counsel appointed to represent the inmate in his habeas corpus efforts. All death row inmates in Virginia have had the assistance of an attorney, whether volunteer or court-appointed, in pursuing state and federal habeas corpus remedies. No inmate has been executed without counsel. Only one of the thirty-two inmates confined in Virginia under sentence of death at the time this case was tried did not then have counsel representing him.⁶

No allegation has been raised in this action that the forms of legal assistance made available by Virginia are inadequate to meet the access rights of the inmate population generally. The district court in fact acknowledged that the Virginia system for providing legal assistance had previously been found adequate to satisfy the state's duty under *Bounds*. 668 F.Supp. at 514 (Pet. App. A-27). The challenge here is based entirely on the premise that inmates under sentence of death require *additional* assistance.

The inmates in this case have attacked the adequacy of a system that they have, with few exceptions, declined to attempt to use. They have chosen to rely primarily on an alternative system of privately recruited volunteer attorneys instead of the assistance available in the Virginia courts and the institutions. The perceived threat of a collapse of that volunteer system led the district court to impose upon Virginia the obligation of providing assistance in the form that the inmates previously had obtained privately. There has been no showing whatsoever that the system Virginia already has in place, if properly utilized by the inmates, is inadequate to meet their needs. The abstract nature of the district court's inquiry is reflected in the speculative nature of the court's determinations.

1. The district court's rejection of Virginia's methods of providing legal assistance cannot be properly considered as factual findings based on the record.

The district court's determination that Virginia does not meet its obligation of providing death row inmates access to the courts is based on generalized policy considerations, not evidentiary findings. The district court made no finding that any inmate was deprived of adequate library time; no finding that any inmate's case was too complex or difficult for him to attempt to raise a particular claim; no finding that any inmate was so preoccupied with his fate that he could not pursue relief on his own; and no finding that any death row inmate was refused assistance from an institutional attorney in preparing his habeas corpus action. As all Virginia death row inmates have in fact been represented by counsel in the preparation of their state habeas corpus actions, the record simply cannot support a determination that any death row inmate was denied access to the courts as a result of an inadequate system of providing legal assistance.

Assuming that the "considerations" selected by the district court have some relevance, they have not been demonstrated to be uniformly applicable to these inmates as a class. The record does not show that these "considerations" apply even to a significant part of the class of Virginia death row inmates. These generalized beliefs are not findings of fact, and the district court did not so label them. In fact, as Judge Wilkinson noted in dissenting below, it is difficult to conceive of how such sweeping generalizations could be made as factual findings given the requirements of the federal rules for class actions. 847 F.2d at 1125 (Pet. App. A-13).

The procedural device of a class action does not warrant transforming generalized statements of policy into factual findings. Nor does the Fourth Circuit's endorsement of the district court's determinations automatically change these "considerations" into particularized findings of fact. There are *no* findings of fact made by the district court which compel deference to the district court's interpretation of what the right of access to the courts requires.

The deference given to a trial court's findings of fact does

⁶ The inmate, Richard Boggs, was being assisted by the institutional attorney in the preparation of a habeas corpus petition. The attorney's efforts to obtain a complete record of the trial proceedings were impeded, in part, by the inmate's reluctance to cooperate fully in that attempt. (J.A. 237). Boggs has since obtained a volunteer attorney.

not limit a reviewing court's power to correct errors of law, including those that may infect a finding of fact, or mixed questions of law and fact. *Bose Corporation v. Consumer Union*, 466 U.S. 485, 501 (1984). Generalized considerations and beliefs cannot substitute for facts. Absent facts showing a deprivation of a right, the courts should not impose their ideas of what policy considerations suggest as the best response to a perceived problem. See *Rhodes v. Chapman*, 452 U.S. 337, 348-49 (1981).

The district court's errors of law, and its reliance on general considerations rather than the factual record, compel rejection of its conclusions concerning the adequacy of the Virginia system. To the extent that the court's conclusions can be considered factual findings, they are without support in this record and must be deemed clearly erroneous.

2. The district court erroneously interpreted Virginia law in rejecting the availability of court-appointed counsel.

The record in this case establishes that Virginia courts have appointed lawyers for the death row inmates without counsel who have requested such assistance. (J.A. 325, 353). To the extent that an individual death row inmate may have special and difficult claims and lack the ability to present them, he may seek and obtain the appointment of counsel to represent him.

The district court erroneously interpreted Virginia law as authorizing appointment of counsel only after a petition is filed raising non-frivolous claims. In that situation, the assistance was deemed to come too late to satisfy the state's obligation to provide access to the courts. The district court, however, determined an issue that the Virginia Supreme Court has never been called upon to address, and which the lower Virginia courts have decided quite differently than the district court.

The Virginia Supreme Court has held that state courts must appoint counsel for unrepresented inmates in habeas corpus actions where a non-frivolous petition is presented raising triable issues of fact. *Darnell v. Peyton*, 208 Va. 675, 677-78, 160 S.E.2d 749, 751 (1968). The Court has not addressed the question that the district court resolved, but has had the opportunity to consider the issue of appointing counsel only when a petition had in

fact already been filed. See *Howard v. Warden*, 232 Va. 16, 348 S.E.2d 211 (1986); *Cooper v. Haas*, 210 Va. 279, 170 S.E.2d 5 (1969); *Arey v. Peyton*, 209 Va. 370, 164 S.E.2d 691 (1968).

The statutory authority cited by the Court in *Darnell* does not require the prior filing of a petition before the court may appoint counsel. See Va. Code § 14.1-183. The district court's conclusion that appointments are made only after a petition is filed and only if a non-frivolous claim is raised, ignores the *uncontradicted* evidence in the record. Virginia courts have in fact provided appointed counsel for death row inmates without requiring them first to file a petition. (J.A. 325, 353).

The only factual circumstance cited by the district court to support its conclusion was one instance in which "the Commonwealth's counsel contended, unsuccessfully, that the Court had no authority to appoint counsel in a habeas corpus proceeding." 668 F.Supp. at 514 n.1 (Pet. App. A-28). However, the authority of a trial court to appoint counsel for a habeas corpus proceeding involving a hearing, as in the instance the court cited, has been clearly established in Virginia since 1968 by *Darnell v. Peyton*.

The plaintiffs have offered the circumstances of inmate Earl Washington as the centerpiece of their argument that Virginia's means of providing legal assistance is inadequate. Washington's case, however, provides no support for their claim.

Washington appeared in the Circuit Court of Culpeper County at a July 3, 1985 proceeding to set an execution date following the denial of his petition for a writ of certiorari in this Court on May 13, 1985. The local prosecutor (the Commonwealth's Attorney) represents the state in these proceedings. Washington was represented by retained counsel. The circuit

⁷ The court apparently referred to the habeas corpus action of inmate James Clark. The district court described the case as "a matter before the Circuit Court of Clarke County," but no evidence at the trial of this action referred to any proceeding in that court. The attorney who represented Clark testified in this action that he moved for appointment at the end of the habeas corpus hearing in the trial court, and the motion was opposed on the grounds that there was no statutory authority for the appointment. (J.A. 98, 110). The attorney was appointed to represent Clark, and that issue was not contested in the Commonwealth's appeal of that case. See *Virginia Department of Corrections v. Clark*, 227 Va. 525, 318 S.E.2d 399 (1984).

court set an execution date for Washington for September 5, 1985. According to the order, Washington's attorney moved the court to appoint counsel to represent Washington "in any habeas corpus proceeding," and the motion was denied. (J.A. 314). The record does not disclose whether Washington's retained attorney asked to have himself or another attorney appointed.

No evidence was presented in this case to explain further the circumstances of the motion or the court's action. No habeas corpus actions had been filed on Washington's behalf at that time. There is no evidence that Washington made any effort to seek assistance available to him at the institution or to seek appointment of counsel himself, and not through his retained counsel. There is no evidence that Washington or anyone acting on his behalf sought a stay of execution to permit the inmate more time to prepare a petition or find counsel.⁸

Virginia has not acted to deny counsel to death row prisoners in habeas corpus actions. There is no evidence that any request for counsel by an *unrepresented* death row inmate has ever been opposed by the Commonwealth or denied by a state court. In fact, the Attorney General's Office has represented its willingness to join in motions for appointment of counsel if a death row prisoner seek this assistance.

Plaintiffs sought to confuse this issue below by noting occasions when the Attorney General's Office or a local Commonwealth's Attorney had objected to motions made by *volunteer* counsel seeking to have themselves appointed by the court. The reasons for those objections are obvious: the prisoner already has an attorney, and asking the court to appoint him infringes on the

⁸ Plaintiffs characterize inmate Washington's case as an attempt by Virginia to execute an unrepresented prisoner who was unable to institute state habeas corpus proceedings, and offer it as the example of the "crisis in Virginia." As the record shows, the Attorney General's Office had been advised that a petition would be filed on Washington's behalf. (J.A. 283). The Attorney General's Office was not involved in the Washington case at the sentencing proceeding. In a case where no petition is filed and the prisoner indicates that he wants to file a petition, the Attorney General's Office will join motions to appoint counsel and obtain a stay. (J.A. 271-72, 273, 278, 282). Nothing in this record even remotely suggests that Virginia attempts to execute prisoners who do not have lawyers.

court's discretion to determine whom to appoint. As is also clear, the courts considering such motions decide the issue, not the Attorney General's Office. Some courts have accepted the Attorney General's position and some have not. The result of the denial of such motions is *not* that the inmate is left without counsel. He still has counsel on the same terms that the lawyer accepted when he took the case as a volunteer.

In sum, the record does not establish a lack of authority for court appointed counsel and cannot support an assumption that state court judges are hostile to such appointments. The plaintiffs' indignation at the Commonwealth's objections to the appointment of volunteer counsel reveals the real basis for their dissatisfaction with the assistance Virginia already provides. The inmates want the Commonwealth to pay for the services of volunteer counsel instead of having local courts appoint counsel not of the inmates' own choosing. The state, however, is not obligated to provide a litigant counsel of his choice at state expense even in the context of the accused in a criminal trial, much less in a collateral proceeding. See *Morris v. Slappy*, 461 U.S. 1 (1983).

3. The district court's "considerations" concerning the ability of death row inmates to make effective use of a law library are not supported by the record.

There may be inmates who cannot effectively use a law library, but there is no evidence that the inmates on Virginia's death row are uniformly disabled from making any effort to research and develop claims using a law library. This lawsuit, for example, was initiated by death-row inmate Joseph Giarratano in a *pro se* complaint. (J.A. 4-7).

Time considerations were not shown to limit the practical ability of an inmate proceeding *pro se* to research and develop his claims.⁹ In the context of a state habeas corpus action, the

⁹ The district court noted that an execution date may be set as close as thirty days from imposition of sentence. Va. Code § 53.1-232. However, as the district court acknowledged, stays of execution may be granted to permit the inmate additional time to prepare and present his petition to the appropriate courts.

same state court that sets an execution date will be the first state court to consider the petition. There is no basis in the record for concluding that the court would deny an inmate sufficient time to prepare his petition and have it considered. In fact, the *plaintiffs* offered evidence to show that death row inmates remain on death row without lawyers to represent them for "lengthy periods of time." (TR. 192).

There is simply no basis for an across-the-board assumption that all cases involving a death sentence are so inherently complex that no class member can present his claims without a personal attorney to represent him.¹⁰ Nor can it be presumed that an inmate convicted of a non-capital offense is confronted with intrinsically less difficult or complex issues.

The plaintiffs have stressed the need for a factual investigation of the offense and all aspects of the prisoner's background as the primary difficulty encountered in a capital habeas corpus action. The difficulty of conducting factual investigations while incarcerated, however, is not unique to death-sentenced prisoners. All prisoners are similarly disadvantaged in their ability to reinvestigate the facts of their offenses. Presumably, all prisoners could benefit from personal private investigators provided to them by the state to allow an unlimited opportunity to discover and present new facts to challenge convictions. But there is no requirement that such factual investigatory support be provided for the accused *at trial*, much less in a collateral proceeding. What is at issue here is *legal assistance* to assure access to the courts. An attorney is not provided, even at trial, to be a private investigator. See *United States v. Gouveia*, 467 U.S. 180, 191 (1984).

Finally, the district court relied upon a "fair inference that an inmate preparing himself and his family for impending death

¹⁰ The district court stressed the nature of a capital trial, which includes separate guilt and penalty phases, and noted the necessity of analyzing the often voluminous record of such proceedings and the issues of aggravation and mitigation involved. (Pet. App. A-26). Although such a review may be time-consuming, as the district court noted, all inmates of the class certified by the district court have not been shown to be incapable of conducting a review of their cases and raising claims based on such a review. As has been noted moreover, all Virginia death row inmates have had lawyers to conduct such a review.

is incapable of performing the mental functions necessary to adequately pursue his claims." 668 F.Supp. at 513 (Pet. App. A-26). This potential individual circumstance, however, cannot be transformed into an enduring class-wide status that precludes all death row inmates from making any effort to challenge their convictions. Neither inmate who testified suggested any preoccupation with the possibility of an execution.

Thus, the "considerations" relied upon by the district court are either unsupported by the evidence or insufficient to distinguish death row inmates as a class requiring special access assistance. To the extent that the factors cited by the district court may apply to some particular inmate, that prisoner still has available to him the assistance provided at the institution by the institutional attorney and the opportunity to request court appointed counsel to represent him.

4. The district court's "finding" that the assistance the institutional attorneys are able to provide is inadequate is factually flawed and based on an erroneous concept of access to the courts.

As the district court noted, the Virginia system of providing legal assistance by way of institutional attorneys previously had been found sufficient by that court and the Fourth Circuit to meet the state's obligation under *Bounds*. 668 F.Supp. at 514 (Pet. App. A-27).

The district court's assumption that institutional attorneys could not meet the demand of assisting death row inmates is unfounded. The number of attorneys provided, and the hours they devote to their duties, reflect what has been necessary for them to accomplish their tasks. The number of attorneys is not fixed, nor are their hours inflexible. The attorneys indicated their willingness to spend the time necessary to do what is required under their appointments. (J.A. 252-53, 259-60). As the district court acknowledged, additional attorneys may be appointed if the need arises.

More significantly, however, the district court discounted the assistance available from the institutional attorneys for

"these plaintiffs" because of its conclusion that "only the continuous services of an attorney to investigate, research, and present claimed violations of fundamental rights provides them the meaningful access to the courts guaranteed by the Constitution." 668 F.Supp. at 514 (Pet. App. A-28). By equating the right of access to the courts with a right to counsel, the district court erred as a matter of law. As is evident from the testimony of the institutional attorneys, they are available to provide the inmates with legal assistance in the filing of post-conviction complaints that includes virtually everything except acting as counsel of record. This is the assistance they have provided to other inmates generally, and this is the assistance they will provide to the death row inmates if requested to do so.

CONCLUSION

The expansion of the right of access to the courts to include a new right to counsel for death-sentenced inmates in state collateral attacks represents a radical departure from existing law and an unprecedented intrusion by federal courts into matters peculiarly the responsibility and concern of the States. By creating a special and preferred status for death row inmates in state habeas corpus proceedings, the courts below have ignored the presumption of finality that attaches to a criminal conviction once a trial and direct appeal have concluded. Capital defendants already benefit from the most careful and meticulous procedural protections devised for any aspect of our legal system. That the protections already afforded are appropriate does not warrant their endless extension in a manner not justified by this record, by this Court's prior decisions, or by a concept of fundamental fairness to death row inmates.

This case is about the drawing of lines. It is about the requirements of a system that meets the demands of fundamental fairness. It is about whether a rationale that "death is different" justifies a special system of post-conviction review in the state courts that is not available to other inmates. The inmate plaintiffs have couched their claim in terms of access to state courts, but realistically, their claim is that fairness in capital cases requires the extension of a constitutionally imposed right to

counsel to state post-conviction proceedings. —

This Court already has rejected that argument on a number of occasions. The lines previously drawn are clear, and are clearly inconsistent with the disposition of this case by the courts below. In seeking a reversal of the Court of Appeals, the petitioners ask merely that this Court reaffirm the reconciliation of the values of finality, comity and fairness that this Court previously has recognized.

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

EDWARD W. MURRAY, DIRECTOR, VIRGINIA
DEPARTMENT OF CORRECTIONS, et al.,

Petitioners,

v.

JOSEPH M. GIARRATANO, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Did the Fourth Circuit, sitting *en banc*, err in holding (a) that the District Court's findings of fact, supporting its conclusion that Virginia's Death Row inmates are deprived of meaningful access to the courts to pursue state habeas corpus remedies, were not clearly erroneous, and (b) that the District Court's remedy of requiring that legal representation be provided prior to, rather than following, the filing of state habeas corpus petitions did not constitute an abuse of discretion?

2. Should the lower courts' decisions be affirmed on the alternative grounds of the Eighth Amendment, the due process clause of the Fourteenth Amendment, the equal protection clause of the Fourteenth Amendment, the Sixth Amendment, or Article I to the United States Constitution?

LIST OF PARTIES

The plaintiffs in the proceedings below included Joseph M. Giarratano, Johnny Watkins, Jr., Richard T. Boggs and a class certified by the District Court, comprised of

all persons, now and in the future, sentenced to death in Virginia, whose sentences have been or are subsequently affirmed by the Virginia Supreme Court and who either (1) cannot afford to retain and do not have attorneys to represent them in connection with their post-conviction proceedings, or (2) could not afford to retain and did not have attorneys to represent them in connection with a particular post-conviction proceeding.

847 F.2d 1118, 1120 (4th Cir. 1988). The "future" category has come to include, in the 30 months following the trial, fifteen new Death Row inmates.

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BRIEF FOR RESPONDENTS

The reliability of society's decision to impose its most severe sanction depends on the outcome of habeas corpus proceedings brought in state and federal courts by Death Row inmates. During the twelve years since executions have resumed in this country, the majority of Death Row inmates who have brought such proceedings have prevailed in overturning their sentences. All were represented by lawyers.

The Commonwealth of Virginia is one of a few remaining states that still do not provide lawyers for habeas proceedings in capital cases. Unlike other jurisdictions, Virginia is determined to treat capital cases the same as matters where a human life is not at stake. Accordingly, Petitioners have argued below that a death sentence is not "a real and immediate threat of injury" and even

that erroneous execution is not an "irreparable injury." (Opening Brief of Appellant Cross-Appellee (4th Cir.) at 40 n.5; Memorandum in Support of Defendants' Response to Plaintiffs' Motion for A Preliminary Injunction (E.D. Va.) at 16-17)

Virginia's exceptional views are compounded by a phenomenon unique to the Commonwealth: Virginia has no qualms over executing the unrepresented. The Commonwealth immediately sets execution dates for Death Row inmates who do not file habeas petitions within a few weeks of the conclusion of their direct appeals (including certiorari). If a condemned person fails to meet the Commonwealth's schedule, Virginia officials admit they will electrocute him "whether he [has] a lawyer or not." (J.A. 284)

The purpose of this case is not, contrary to the claims of Petitioners and the Fourth Circuit dissenters, to challenge whether Virginia may impose capital punishment. The Commonwealth has executed three men since this action was filed. The issue here is whether a state that does choose to invoke the ultimate sanction must bear the attendant obligations recognized as critical by Congress, the other states, and the courts.

Many, many times in the half century since the Scottsboro decision, this Court has recognized that the punishment of death is vastly unlike all others; special measures are called for to ensure that society does not mistakenly execute the innocent. This is such a time. The Constitution cannot permit a state to bar its Death Row inmates from access to conventional remedies by denying them legal assistance and hastily executing them -- not when more than half of those who, so assisted, demonstrate that their sentences were improper.

STATEMENT OF THE CASE

I. THE FACTUAL SETTING

A. The Crisis in Virginia

This case arose when Virginia attempted to execute a mentally retarded Death Row inmate who, because he could not afford a lawyer, was unable to institute state habeas corpus proceedings. (J.A. 162-63) Seven weeks after this Court denied

certiorari on the direct appeal of Earl Washington's conviction and death sentence, Mr. Washington asked a Virginia Circuit Court judge to appoint a lawyer to help him file a state habeas petition. The judge denied Mr. Washington's motion and, in the same order, scheduled his execution. (J.A. 101, 162-63; Px 22, J.A. 314) Mr. Washington's only opportunity for living long enough to begin his habeas proceedings therefore lay in his somehow finding (and persuading) an attorney to take his case without pay.

In Virginia, the sole method for a Death Row inmate to obtain counsel is by asking a fellow Death Row inmate, Respondent Joseph M. Giarratano, to contact Marie Deans of the Virginia Coalition on Jails and Prisons. (J.A. 198-99) Ms. Deans, a non-lawyer, formed this organization in 1983 after learning that "nobody in Virginia seemed to know who was [on Death Row] and who had attorneys and where they would get attorneys if they needed attorneys." (J.A. 154) Ms. Deans therefore began monitoring Virginia's Death Row, and attempting to find lawyers for the inmates who needed them. (J.A. 155)

The Commonwealth itself has relied exclusively on this layperson and her uncompensated recruiting efforts as Virginia's "system" of legal assistance for Death Row inmates. James Kulp, Virginia's Senior Assistant Attorney General and "Coordinator of all Capital Litigation in the Commonwealth," (J.A. 269) testified:

- Q. Now, what happens after a certiorari lawyer who has been doing this case for free tells you he is not able to handle it anymore? What do you do?
- A. In the past I have been calling Marie Deans. Or she has called me, one or the other.
- Q. What do you tell her?
- A. I said, are we going to have somebody represent this person? And she says, yes, we are looking. And at times she has difficulty, but she has had people and we have dealt with them

(J.A. 288-89; *see also* J.A. 229, 231, 242-43, 244, 283) As Petitioners acknowledge (Br. at 7), Ms. Deans has experienced increasing difficulty in locating volunteers to represent Virginia's in-

digent Death Row inmates. (J.A. 157-58; *see also* J.A. 68-69, 75, 76-77, 167, 199-200, 233-34)¹

When Ms. Deans began looking for a lawyer for Mr. Washington (while simultaneously searching for lawyers for four other Death Row inmates (J.A. 162)), she found that the supply of volunteers was exhausted:

I contacted over a hundred attorneys. I contacted the D.C. Pro Bono bar, the Legal Defense Fund, the Southern Prisoners Defense Committee, Attorneys in Georgia, if you believe that. Attorneys in South Carolina, Attorneys in North Carolina. All the way up through New York. I went to large firms, I went to anybody.

(J.A. 158-59; Px 1; J.A. 296) Nobody would take Mr. Washington's case. (J.A. 162)

A little more than a month after denying Mr. Washington a lawyer, the Commonwealth moved him 100 miles away from Death Row to a small cell in the basement of the State Penitentiary in Richmond -- down the hall from the electric chair. (J.A. 11-13, 162, 204) Ms. Deans again implored the Virginia Bar for help. (J.A. 306-10) Other people and organizations, including the NAACP Legal Defense and Educational Fund and the American Civil Liberties Union, also began scrambling to find someone to represent him. (J.A. 68, 306-10)

With Mr. Washington's execution barely two weeks off, Mr. Giarratano, in desperation, wrote United States District Judge Robert R. Merhige, asking his assistance because of the "gravity of the situation":

Dear Judge Merhige:

...

A fellow co-plaintiff in the above styled matter, Earl Washington, Jr., was transferred to the State Pen on August 16, for execution on September 5, 1985.

¹The burden of undertaking this representation on a volunteer basis is extraordinary. Capital post-conviction cases are a tremendous financial, professional, and emotional drain on attorneys, both because of the hundreds of hours of time involved and the out-of-pocket expenses. (J.A. 75-76, 99, 132-34, 140-41, 150-51, 153, 156-57; Px 3)

Mr. Washington has all of his State post-conviction remedies open to him: unfortunately Mr. Washington is mentally incapable of acting in his own behalf. The Virginia Supreme Court (sic) has denied a request to appoint counsel to assist him in pursuing a petition for state habeas corpus; or to stay the mandate. Because of his indigency he cannot retain counsel.

Ms. Marie Deans, Director of the Virginia Coalition on Jails and Prisons, has spoken with well over 50 attorneys in hopes that one would assist on a *pro bono* basis. To date all of these efforts have failed.

...

If it is at all possible and proper it would be much appreciated if the Court would lend its guiding hand in this current dilemma.

...

Respectfully,

Joseph M. Giarratano

cc: Office of the Attorney General

(J.A. 11-13) In response to this plea from Death Row, Judge Merhige himself began soliciting attorneys. He was unsuccessful. (J.A. 246)

Finally, only a week before Mr. Washington's scheduled execution, when no other attorney could be found, counsel who had recently been located to assist in this action stepped in temporarily to prepare an emergency petition for writ of habeas corpus. A few days before Mr. Washington was to be electrocuted, he obtained a stay of execution. (J.A. 162, 166)

Mr. Kulp admitted at the trial below that, even though the Office of the Attorney General was aware that Mr. Washington was desperately searching for a lawyer to help him begin habeas proceedings, the Commonwealth would have electrocuted him:

- Q. If you didn't hear from Mr. Washington, you ... were going [to] execute him whether he had a lawyer or not, isn't that correct?
- A. The order would have been carried out I am sure.
- Q. The order of execution?
- A. That is correct.

(J.A. 284; *see also* J.A. 289)

Mr. Kulp's candid admission was unremarkable, at the time, to him or to the Commonwealth.² Earl Washington was not the first unrepresented man Virginia had tried to execute before he could pursue conventional post-conviction remedies.

In 1982, Wilbert Evans sat on Death Row, without a lawyer, only one week before his scheduled execution. Like Mr. Washington, his lack of representation had prevented him from beginning habeas proceedings. (J.A. 129) His predicament, which arose before Ms. Deans came to Virginia, was also a matter of no concern to the Commonwealth. Mr. Evans's sole assistance in obtaining legal help came not from Virginia, but from the A.C.L.U. Three days before his scheduled death, a volunteer lawyer recruited 72 hours before by the Virginia Civil Liberties Union commenced state habeas proceedings and obtained a stay. (*Id.*) Ultimately, based on evidence uncovered by this attorney, the Commonwealth conceded that Mr. Evans's death sentence was unconstitutional. (J.A. 132)

The representatives of the plaintiff class in this action were similarly unable to obtain legal representation. Two weeks before the Commonwealth scheduled Mr. Washington's execution, the Virginia Supreme Court affirmed the convictions and death sentences of named Plaintiffs Richard Boggs and Johnny Watkins, Jr. As permitted by Virginia law, their appointed attorneys withdrew from representation. (J.A. 161, 165) Ms. Deans immediately began searching for volunteer lawyers to represent Messrs. Boggs and Watkins on certiorari and in state habeas proceedings -- while simultaneously seeking counsel for Mr. Washington and fellow Death Row inmates Syvasky Poyner, Dana Edmunds, and Willie Leroy Jones. (J.A. 160-65)

It took Ms. Deans from June 1985 until June 1986 to find a volunteer lawyer to commence Mr. Watkins's state habeas proceedings. (J.A. 117, 161) Mr. Boggs was not so fortunate. At the time of the July 10, 1986 trial below -- 13 months after his ap-

²Mr. Kulp's former colleagues (J.A. 275) now advise this Court that "Nothing in this record even remotely suggests that Virginia attempts to execute prisoners who do not have lawyers." (Br. at 28, n.8)

pointed attorney withdrew -- he still had no lawyer to help him begin habeas proceedings. (J.A. 164-65)

Messrs. Watkins and Boggs owe their lives to one fact -- the existence of this lawsuit. Otherwise, the Commonwealth, indifferent to their lack of representation, would have executed them.³ In Mr. Kulp's words: "[i]f Mrs. Deans calls and says we don't have any counsel, we can't get any counsel... we are obviously not going to sit there from now to dooms day waiting on somebody to do something." (J.A. 289; *see also* J.A. 50-52, 366)

The circumstances of Messrs. Washington, Evans, Boggs, and Watkins typify those of indigent Virginia Death Row inmates. (J.A. 157-65, 296) James Briley waived the right to petition this Court for writ of certiorari because he had no lawyer. He did not obtain counsel until two weeks before his execution date, when a federal court finally appointed counsel (he had not yet commenced state habeas proceedings). (J.A. 67) Syvasky Poyner's certiorari petitions had to be drafted by another inmate. (J.A. 199-200) Moreover, at the time of trial, there were five new Death Row inmates (Messrs. Payne, Gray, Beaver, Pruitt and Correll) who would shortly need post-conviction counsel. Ms. Deans had no idea how she would find lawyers for them. (J.A. 166-67)

B. The Importance of Capital Post-Conviction Proceedings

The post-conviction proceedings that Virginia's Death Row inmates are in jeopardy of foregoing are vitally important. They achieve results that set them apart from non-capital proceedings. At trial, Plaintiffs' expert John C. Boger, who has monitored America's Death Row since 1978, estimated that more than half of all Death Row inmates obtain relief in post-conviction proceedings. (J.A. 51) While the rates of success in federal non-capital habeas proceedings are extremely low, ranging from .25% to 7%, the success rate for capital federal habeas proceedings has ranged, in the last decade, from 60 to 75%. *Barefoot v. Estelle*, 463 U.S. 880, 915 (1983) (Marshall, J., dissenting) (citing Brief for NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae);

³After eventually obtaining a volunteer lawyer, Mr. Boggs succeeded in vacating his death sentence in federal habeas proceedings.

Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 Am. U. L. Rev. 513, 520-21 (1988) (collecting statistics). Last year, this Court included ten capital cases in its slender docket; it decided seven in favor of the Death Row inmates.

Because of exhaustion requirements, procedural default rules, and the deference given state habeas corpus proceedings by federal courts, state post-conviction proceedings are uniquely important. Indeed, adequate representation at that stage is an integral part of federal court success. Any errors made at the state level can bar an inmate from later asserting potentially meritorious claims in either subsequent state proceedings or in federal court. (J.A. 55, 58-59, 77-78, 94)

In fact, Mr. Boger testified that "the state post conviction petition is often the most critical single document in the capital litigation." (J.A. 55) This is particularly so in Virginia, as emphasized by the Fourth Circuit. In Virginia, "all claims, the facts of which are known at the time of filing, must be included in that petition as they may not be raised successfully in a subsequent filing and those claims also could not be considered in federal court because federal courts generally may not consider claims barred by Virginia procedural rules." 847 F.2d at 1120 n.4 (citing *Whitley v. Bair*, 802 F.2d 1487 (4th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987)). The Commonwealth provides its death-sentenced prisoners with no assistance in preparing this crucial pleading.

The vital role counsel plays in these proceedings was well demonstrated by testimony at the trial of this action. Attorney Robert Hall, who represented Virginia Death Row inmate James T. Clark, described his efforts to develop a social history and psychiatric profile of Mr. Clark to demonstrate the substantial mitigating evidence available to, but ignored by, Mr. Clark's trial attorney. (J.A. 91-96; Tr. 80-84) With respect to this extensive evidence, "Mr. Clark was virtually unaware in his present mind of most of this. . . . He had no present recollection of many of the events. He had no awareness of any of it that was helpful to him that we could discern." (J.A. 96) As a result of Mr. Hall's investigation and presentation at an evidentiary proceeding, the state trial court granted Mr. Clark's petition for writ of habeas corpus.

(J.A. 96) Although the Virginia Supreme Court reversed, Mr. Clark ultimately received relief in federal court. (J.A. 96-97)

Likewise, Jonathan Shapiro, who represented Virginia Death Row inmate Wilbert Evans, conducted a far-reaching factual investigation. (J.A. 130-31) In the course of this investigation, Mr. Shapiro discovered, (1) by traveling to North Carolina, that the evidence regarding Mr. Evans's North Carolina record (offered at sentencing) included "convictions" which were not in fact convictions and, (2) by looking in the probation officer's file, that the Commonwealth's Attorney was aware, prior to trial, of that fact. (J.A. 131) In Mr. Evans's case, the Commonwealth conceded that his sentence was unconstitutionally imposed. (J.A. 132) Mr. Evans could not have obtained this result from his cell on Death Row: "Obviously no one who is confined in a four by twelve cell can do factual investigation very well." (J.A. 65) For Mr. Evans, this inability almost resulted in his execution before his constitutionally flawed sentence could be vacated -- simply because he had no lawyer to commence his state post-conviction action. (J.A. 129)

C. Capital Assistance Outside of Virginia

Of the 37 states that authorize capital punishment, eighteen provide for an absolute right to counsel in state habeas proceedings to ensure meaningful post-conviction review.⁴ Seventeen of the 30 states where Death Row inmates have actually begun habeas proceedings have automatically (as a matter of law or practice) provided those prisoners with counsel to represent them in

⁴ Ariz. Rule of Crim. Proc. 32.5(b); Cal. [Government] Code § 15421(c); and [Penal] Code § 1240; Conn. Superior Court Rules, Criminal Cases § 959 and Conn. Gen. Stat. Ann. § 51-296(a); Fla. Stat. Ann. § 27.702; Idaho Code § 19-4904 (1987); Ind. Post-Conviction Remedy Rule 1 § 9 (1988); Md. Ann. Code art. 27 § 645A; Mo. Rule of Criminal Procedure 24.035(e) and 29.15(e); N.J. Rules Governing Criminal Practice §§ 3:22-6, 3:27-1 and N.J. Stat. Ann. § 2A:158A-5; N.C. Gen. Stat. §§ 15A-1421, 7A-451(a), 7A-486.3; Ok. Stat. Ann. tit. 22 §§ 1089, 1360; Ore. Rev. Stat. § 138.590(3); Pa. Rule of Crim. Proc. 1503; S.D. Codified Laws Ann. § 21-27-4; Tenn. Rules of the Supreme Court 13(1); Utah Rule of Civil Procedure 65B(i)(5); Wash. Superior Court Criminal Rules 3.1(b)(2); and *Alberts v. State*, 745 P.2d 898, 901 (Wyo. 1987). See also Wilson and Spangenburg, *State Post-Conviction Representation of Defendants Sentenced to Death*, *Judicature* (to appear in the April/May 1989 issue).

preparing their habeas petitions. Wilson and Spangenburg, *State Post-Conviction Representation of Defendants Sentenced to Death*, Judicature (to appear in the April/May 1989 issue). A number of states, including Georgia and North Carolina, have also provided state funding of death penalty resource centers to ensure that their Death Row inmates have meaningful access to state post-conviction remedies. Remarks of Lewis F. Powell, Jr., Before the Criminal Justice Section, American Bar Association 8-9 (Aug. 7, 1988). For example, the North Carolina General Assembly recently appropriated \$191,505 for that purpose. 1987 N.C. Sess. Laws (Reg. Sess. 1988) Ch. 1086, § 109. Even at the time of the trial in this action, Mr. Boger estimated that a full third of the death penalty states provided counsel to their Death Row inmates. (J.A. 72-73)

On the federal level, President Reagan signed into law this fall the Anti-Drug Abuse Act of 1988 requiring the mandatory appointment of counsel in federal habeas corpus proceedings for all federal and state prisoners under sentence of death. Pub. L. No. 100-690, 102 Stat. 4181 (1988). Earlier, the United States Judicial Conference had approved federal funding of resource centers to assist in the representation of state death row inmates in federal habeas corpus proceedings. *Guidelines for the Administration of the Criminal Justice Act* (18 U.S.C. § 3006A) App. D-2 (May 20, 1988). Such resource centers have now been funded for 13 states. Wilson and Spangenburg, *supra*.

II. THE PROCEEDINGS BELOW

At trial, the district court heard testimony from 17 witnesses, including two who qualified as experts on capital post-conviction proceedings, four other attorneys who had represented Virginia Death Row inmates in such proceedings, four attorneys responsible for counseling inmates in Virginia prisons, and two Virginia Death Row inmates. Based on this evidence, the district court found that Virginia's Death Row inmates are incapable of effectively using prison law libraries to pursue post-conviction remedies *pro se*; that the system of legal assistance provided to Death Row inmates by Virginia is inadequate to ensure meaningful access to

post-conviction remedies; and that volunteer attorneys are no longer available to carry the Commonwealth's burden.

A. Death Row Inmates Are Incapable of Proceeding *Pro Se* in Post-Conviction Proceedings

The district court first analyzed the capability of Death Row inmates to use the Virginia prison law libraries to pursue their post-conviction remedies *pro se*. It found, from uncontradicted testimony, that they cannot. This finding was based on the interplay of three specific factors: (1) "the limited amount of time death row inmates may have to prepare and present their petitions to the courts"; (2) "the complexity and difficulty of the legal work itself"; and (3) the fact that "an inmate preparing himself and his family for impending death is incapable of performing the mental functions necessary to adequately pursue his claims." 668 F. Supp. at 513. These findings are well-founded in the record.

Respondents' first expert witness was Mr. Boger, an attorney who has represented 60 to 80 Death Row inmates in post-conviction proceedings and has significantly assisted in the representation of 200 to 300 others. (J.A. 50) He testified that, in his entire experience, he had *never* known a Death Row inmate capable of representing himself in post-conviction proceedings. (J.A. 65) He explained:

In matters of legal research, capital cases are particularly difficult, and although some clients are bright and could understand one stage of a proceeding sometimes, and one facet of the criminal law, very few can integrate the procedural and substantive and the constitutional questions that are needed in order to make accurate assessments of what issues have merit and what don't.

In . . . theory there are some death row inmates who can articulate one or two constitutional claims if given proper access to legal resources. I have never met one who could adequately prepare an entire petition that lays out a series of claims.

(J.A. 65-66, 81; *see also* J.A. 74) No contrary evidence was offered. Defendants identified not one Death Row inmate -- from Virginia

or anywhere else -- who had litigated habeas proceedings *pro se*. Nor did they offer a single witness to testify that any Death Row inmate could represent himself effectively.

Instead, Defendants only introduced evidence of the existence of law libraries at various Virginia prisons -- without regard to whether Death Row inmates even had access to those libraries. For example, at the Virginia State Penitentiary, where every Virginia Death Row inmate spends his last few weeks before execution, he is prohibited from entering a law library *at all*. (Br. at 3; J.A. 32-33; Dx 5, J.A. 339) Nor, as Petitioners admit, can Death Row inmates confined at Powhatan Correctional Center visit that prison's law library. (Br. at 3; Dx 11, J.A. 346) Only Death Row inmates confined at Mecklenburg Correctional Center can even enter a law library. There, locked in cages, they may ask an untrained clerk for one book at a time. No direct access to lawbooks, or browsing, is permitted. Mecklenburg Death Row inmates are permitted this "privilege" a maximum of twice per week (depending on the needs of almost 40 other Death Row inmates) for a maximum of two and one-half hours per visit. (J.A. 207, 264-67, 321-22, 358)

Under such conditions, skilled lawyers could not conduct the legal research necessary for litigating a capital habeas proceeding. But we are not talking about the capability of lawyers. Virginia asks this Court to conclude that an Earl Washington, confined a few feet from the chair in which he will die within two weeks, can master capital habeas proceedings in time to defeat the Commonwealth in litigation.

1. The Time Constraints of Capital Habeas Cases

The district court found that Death Row inmates have only a "limited amount of time . . . to prepare and present their petitions to the courts." 668 F. Supp. at 513. (See also J.A. 58, 64-65, 97-98, 146-51) Once an execution date is set -- which, in Virginia, can happen "at any time" after affirmance by the Virginia Supreme Court -- the condemned must be prepared to conclude *all* of his post-conviction remedies before that date. 668 F. Supp. at 513. Of course, no non-capital inmate must face that kind of time schedule.

For example, immediately after the Virginia Supreme Court rejected Richard Whitley's appeal from a denial of state habeas relief, the Commonwealth scheduled his execution. He had one month to conduct his entire federal post-conviction litigation. (J.A. 145-48) His volunteer attorney, Timothy Kaine, testified that he managed to file a habeas petition in federal district court within two weeks. (J.A. 148) Fifteen days later (six days before the execution date), the district court dismissed the habeas petition and denied motions for a stay and for a certificate of probable cause. (J.A. 149) Mr. Kaine was therefore constrained to fly to Abingdon, Virginia to try to obtain a certificate of probable cause and a stay of execution from a Fourth Circuit judge. He succeeded -- after 140 hours of work in a 10-day period -- four days before Mr. Whitley's scheduled execution. (J.A. 150-51)

Mr. Boger testified, again without contradiction, that the *Whitley* schedule, both in state and federal courts, is common:

I know plenty of lawyers that have been involved with an execution date facing them and in a 30 or 45 day period before execution who have been unable to get stays in court after court. What that typically involves is 30 days of virtual around the clock work. A lawyer will take a case Monday May First and at [the] end of May they will have done no other work except litigate in five or six courts.

(J.A. 64) In addition, Attorney Jonathan Shapiro described his frantic struggle to file an ultimately successful first state habeas petition after he took on Wilbert Evans's case just days before Mr. Evans's scheduled execution. (J.A. 129-30) Similarly, Ms. Deans related the frenzied, night and day efforts counsel devoted on behalf of Mr. Washington. (J.A. 162) A Death Row inmate could hardly be expected to do so much for himself in so little time.

Moreover, the Virginia Attorney General's Office imposes its own abrupt deadlines even in the absence of an execution date. It threatens to schedule the executions of *unrepresented* inmates if no action is taken by those inmates within 30 days. (J.A. 193, 349-50) Even while seeking a stay of the mandate of the Fourth Circuit's *en banc* decision, Petitioners saw nothing wrong in advis-

ing an unrepresented Death Row inmate (in the third paragraph of a letter addressed to somebody else) that unless he took some action (that they did not explain how to do) within 30 days, they would schedule his execution. (J.A. 366)

Petitioners offered no evidence that the constraints of litigating in the shadow of execution dates and arbitrary threats of immediate execution do not impede Death Row inmates' ability to represent themselves.

2. The Complexity of Capital Cases

The evidence is uncontradicted that capital habeas proceedings are a complicated, difficult area of the law.⁵ (J.A. 53, 65, 112, 231) An attorney who meticulously litigates every known argument may still waive his client into the electric chair if he does not anticipate a potential change in the substantive law. (J.A. 58, 82, 99) Or, due to a misunderstanding over rules regarding exhaustion of state remedies, procedural default, stays of execution, or abuse of the writ, he can become bogged down in a procedural morass that seemingly prevents any court from hearing his client's claim. (J.A. 58, 61, 63, 139, 151, 281-82) *A pro se* inmate, however, is all but certain -- when litigating under severe time pressure and emotional stress -- to make substantive or procedural mistakes that will irreparably prejudice his rights and bar collateral review -- regardless whether he is later represented by counsel.

Virginia's Death Row inmates resemble Virginia non-capital inmates in one respect: They do not understand what their rights are, or where their remedies lie, much less how and when to vindicate them. (J.A. 114-16, 198-99, 200, 202, 211) Death Row inmates differ drastically, however, in that they do not have the luxury of time to educate themselves. Plaintiff Johnny Watkins testified:

Q. Do you know whether your case went to any other courts after the Virginia Supreme Court?

⁵ The six attorneys who testified at trial regarding their representation of Virginia Death Row inmates in post-conviction proceedings unanimously agreed that such proceedings are extremely time consuming even for lawyers. Experiences ranged from 250 hours (for a case still in progress) to 1,000 hours. (J.A. 64-65, 100, 133, 140, 150-151) The one commodity that a Death Row inmate may not have is time.

A. I think it went up, it went to another court, but I don't know exactly which one.

...

Q. Do you know what court you go to next?

A. No.

Q. Do you know what step you take next to appeal your case?

A. No.

(J.A. 115-16; *see also* J.A. 125-26) Mr. Watkins' bewilderment is understandable. And yet, to save his life, he must obtain instant enlightenment.

In addition to their inability to follow or plan procedural strategies, Death Row inmates also lack the ability to master the substantive legal issues of death penalty litigation. Mr. Boger testified:

It is not the case that because one can file one fourth amendment claim or one fifth Amendment confession claim after a great deal of work if one is a bright, unusually bright criminal defendant that one can integrate that [claim] into a series of 8 or 10 or 13 constitutional claims that may need to be presented.

(J.A. 81) Indeed, Plaintiffs Watkins and Boggs were incapable of using a law library to prepare, not only their petitions for writ of certiorari, but even a motion to this Court for an extension of time.

(J.A. 202) Even Joseph Giarratano, to whom Petitioners continually point for his ability to litigate straightforward civil matters, is helpless to spot the issues of a capital case:

I can't pick an issue out of a transcript without Marie's help.

...

If you mean can I read it and understand it, as far as drawing out legal issues if there is a glaring violation of a Miranda violation I could pick that up, but beyond that, no.

A clear cut issue I couldn't tell you one from another.

(J.A. 201, 207-08; *see also* J.A. 65-66, 81) Mr. Giarratano does not represent himself in his capital habeas proceedings.

In sum, the inabilities of inmates to research even simple issues was best characterized by Virginia itself:

The fact is inescapable that the average prison "writer" is, in spite of protestations to the contrary, uneducated, of borderline intelligence and often antagonistic towards the legal system which he views as responsible for his present predicament. . . . It is submitted that furnishing prison inmates with an extensive legal library would be an exercise in futility, especially where the object of the exercise is to provide meaningful access to the courts.

Brief of the Commonwealth of Virginia as Amicus Curiae in Support of Petitioners, at 8, *Bounds v. Smith*, 430 U.S. 817 (1977). (J.A. 299, 300) A Death Row inmate operating under circumstances and stresses unknown to the average inmate could hardly be expected to do better.

3. The Emotional Toll of Death Row

Finally, the district court found that "at the time the inmate is required to rapidly perform the complex and difficult work necessary to file a timely petition, he is the least capable of doing so." 668 F. Supp. at 513. He is at that time preparing himself and his family for his death -- a task inconsistent with fighting for his life. As Mr. Boger explained, based on 10 years of experience:

Finally, and I think that is perhaps unique to capital inmates in my experience, the prospect of facing death or having to come to terms with an execution date or a date certain for one's demise is [a] seriously enough involving and challenging emotional and personal crisis that even an inmate who was a law graduate and who otherwise had the capability to do legal and factual research, probably does not have the detachment and dispassion to litigate under those circumstances. I have had lots of clients in those last 60 day time periods, and what they are forced to do is to prepare themselves mentally and spiritually and emotionally to deal with their family and

their children, all of whom see them as about to die. And that is a full time job.

And very few of them, I think, even have the emotional resources to talk with you meaningfully at that point about their case. Much less to take it over.

(J.A. 66; *see also* J.A. 81-82, 152) Other witnesses testified, also without contradiction, about Virginia Death Row inmates whose mental and psychological conditions prevented them from assisting their attorneys -- much less effectively pursuing post-conviction remedies *pro se*. (J.A. 93, 96, 200, 202) No contrary evidence was offered.

From this and other unrefuted testimony, the district court found that "the plaintiffs are incapable of effectively using lawbooks to raise their claims. Consequently, the provision of a library does little to satisfy Virginia's obligation to 'assist inmates in the preparation and filing of meaningful legal papers' with respect to Virginia death row prisoners. *See Bounds, supra*, 430 U.S. at 828. Accordingly, Virginia must fulfill its duty by providing these inmates trained legal assistance. *Id.*" 668 F. Supp. at 513.

B. The Commonwealth's Provision of Attorneys for Post-Conviction Proceedings Is Inadequate

Judge Merhige next turned to the question whether Virginia provides adequate legal assistance for post-conviction proceedings. He found the two alleged forms of such assistance -- part-time, counseling lawyers appointed to Virginia prisons under Va. Code § 53.1-40, and the theoretical availability of court-appointed attorneys under Va. Code § 14.1-183 -- insufficient.

1. The Institutional Attorneys Do Not, and Cannot, Provide Legal Representation in Capital Post-Conviction Cases

Underlying any discussion of the role -- or even the availability -- of institutional attorneys for capital habeas cases is one critical consideration: The concept is entirely hypothetical. Until this lawsuit was initiated, everybody in Virginia -- from the Attorney General's Office to Death Row inmates to Marie Deans to the prison attorneys themselves -- held the firm belief that these attorneys did not do capital habeas cases. The idea that they could

be so utilized sprang sheerly from the imaginations of those searching for a defense to this lawsuit.

Regardless of the accuracy of Petitioners' belated predictions about the role of institutional attorneys, one stark fact remains indisputable. As the district court found (668 F. Supp. at 514), in the twelve years such attorneys have been kibbitzing with prisoners, not one of them has *ever* prepared a petition for writ of habeas corpus (state or federal) or a petition for writ of certiorari for a Death Row inmate. (J.A. 180, 182, 224-25, 229-30, 258)

Harry Montgomery, the institutional attorney at Mecklenburg Correctional Center, testified that until this action began, Death Row inmates were considered outside his "jurisdiction": "[T]he attorney situation in death row is a matter which [h]as generally been under the jurisdiction of Marie Deans, Your Honor, to be quite honest." (J.A. 229; *see also* J.A. 230) Accordingly, Mr. Montgomery flatly advised Death Row inmates over the years that he did not do capital habeas cases:

Q. And what did Mr. Montgomery say to you?

A. He told me that he didn't handle that, he weren't handling death row cases, so I would have to prefer (sic) to my lawyers I had before.

(J.A. 119) The Commonwealth concurred. Virginia's chief death penalty lawyer, Mr. Kulp, testified that he too looked -- not to the prison lawyers -- but to Ms. Deans. (J.A. 283, 285, 288-89)

Not until four months after this litigation was begun did Ms. Deans, who has recruited lawyers for Virginia Death Row inmates since 1983, learn of the Commonwealth's new-found plans for institutional attorneys:

THE COURT: Miss Deans, did you realize that these . . . attorneys appointed for the various institutions were available to actually draw pleadings?

A. No, sir, I did not.

• • •

THE COURT: And did you have a contrary understanding prior to [a November 1985 meeting with Mr. Kulp]?

A. Yes, sir, I did.

(J.A. 295) Petitioners concede that Mr. Montgomery did not begin even to monitor Death Row until 1985; Mr. Montgomery admits that he did so in response to this lawsuit. (Br. at 5; J.A. 229)

The very language of the statutory provision for institutional attorneys, Va. Code § 53.1-40, requiring the attorneys to "counsel and assist," falls short of permitting representation. Lest there be any doubt, the Commonwealth strictly admonished its prison lawyers in several memos that their role is only advisory. (J.A. 302, 334, 335) Similarly, the Commonwealth has expressly instructed its institutional lawyers that they may devote only nominal time to each inmate: "It is not contemplated that the type of matters to be handled under this Code Section should require any great amount of time for any one prisoner." (J.A. 303) At least at the State Penitentiary, the maximum time allowed per prisoner is *one hour*. (J.A. 178-79)

Heeding these repeated admonitions, Virginia's institutional lawyers have gleaned a clear understanding of their role: "[W]e are supposed to . . . be kind of like a talking law book. We are supposed to substitute for a decent law library." (J.A. 178) Consequently, prison lawyers do not represent inmates; do not appear in court; do not serve as counsel of record; do not perform factual investigations; do not normally draft pleadings, and never sign them. (J.A. 178-79, 180, 219-20, 235, 251, 255, 258, 302-03, 331; Tr. 375-76) And not one of them has *ever* drafted a habeas petition for a Death Row inmate.

In addition to the Commonwealth's express directions, there are practical restraints preventing the prison lawyers from representing Death Row inmates. A total of seven such attorneys, all of whom additionally have full-time private practices, are responsible for advising almost 2,000 inmates. (J.A. 176, 178, 183, 217, 222-23, 226-27, 253, 254-55, 262-63; Tr. 314) The attorneys conceded that devoting the hundreds of hours required to represent even one Death Row inmate in a capital habeas proceeding would wreak havoc on their solo practices. (J.A. 183, 186, 231, 262-63) They categorically agreed that handling *more* than one such case would be impossible. Yet the Virginia Supreme Court, which af-

firms death sentences in groups of two or three, has affirmed fifteen such sentences in the 30 months since the trial. (Br. at 2 n.1)

Death Row inmates who have sought help from the institutional attorneys have been firmly rebuffed. When Mr. Giarratano and Ms. Deans sought assistance in preparing certiorari petitions for Syvasky Poyner, Mr. Montgomery told Mr. Giarratano that "he didn't know anything about certs. and it [sic] really wasn't much he could do except get copies of case law." (J.A. 200) He told Ms. Deans that "he and Joe were in the same boat, that he had never done a cert. petition." (J.A. 293) At trial, Mr. Montgomery first denied that he had been asked to help prepare Mr. Poyner's papers (J.A. 232, 247), then lamely explained that he thought Mr. Giarratano was being "facetious." (J.A. 249; *see also* J.A. 205-06)

Although he was aware that Earl Washington had an impending execution date and no lawyer (J.A. 204), Mr. Montgomery did nothing. (J.A. 245-46) When the Commonwealth ultimately took Mr. Washington to Richmond to die, Mr. Montgomery washed his hands of the problem; Mr. Washington was out of his "jurisdiction." (J.A. 246-47)

There is no better indicia of the unavailability of assistance from prison lawyers than the cases of Messrs. Watkins and Boggs. During the full year between the filing of this action and the trial, Messrs. Watkins and Boggs sat on Death Row without habeas counsel. (J.A. 161, 165) Nine months before the trial, Mr. Giarratano filed a written grievance with the Virginia Department of Corrections begging that, if permitted by law, the institutional attorneys assist them. (J.A. 315-17) Petitioners were thus given a golden opportunity to disprove all doubts about institutional attorneys.

The Commonwealth's response was to ignore the request. (J.A. 203) Mr. Montgomery's reaction was to put off working for Mr. Boggs on grounds that he "in no way want[s] to discourage anyone else from obtaining a volunteer attorney," and to reject Mr. Watkins because he "didn't handle . . . death row cases." (J.A. 244, 119) No one did anything to assist Messrs. Watkins and Boggs. (J.A. 119-20, 203, 240-45)

Judge Merhige correctly assessed the actual assistance that institutional attorneys could provide Death Row inmates in post-conviction proceedings:

The scope of assistance these attorneys provide is simply too limited. . . . They act only as legal advisors or, to borrow the phrase of one such attorney, as "talking lawbooks." . . . For death row inmates, more than the sporadic assistance of a "talking lawbook" is required to enable them to file meaningful legal papers.

668 F. Supp. at 514. *See also* 847 F.2d at 1120.

2. The Possibility of Obtaining Court-Appointed Counsel is Insufficient to Secure the Rights of Death Row Inmates

The district court next considered the possibility of a Death Row inmate's securing court-appointed attorneys pursuant to Va. Code § 14.1-183, and found:

[T]he timing of the appointment is a fatal defect with respect to the requirements of *Bounds*. Because an inmate must already have filed his petition to have the matter of appointed counsel considered, he would not receive the attorney's assistance in the critical stages of developing his claims. *See Bounds, supra*, 430 U.S. at 828 n.17, 97 S.Ct. at 1498 n.17. Consequently, attorneys appointed pursuant to this statute are, by reason of the lateness of the appointment, unable to provide all of the required assistance.

668 F. Supp. at 515.

The district court's finding is based on the fact that there is legal authority for the guaranteed appointment of counsel only if the Death Row inmate has: (1) prepared and filed a petition, (2) survived a motion to dismiss, *and* (3) convinced a court that the issues raised by the petition are "substantial" and require an evidentiary hearing. *Darnell v. Peyton*, 208 Va. 675, 160 S.E.2d 749 (1968). The Virginia Supreme Court has confirmed that appointment under § 14.1-183 is at all other times wholly discretionary. *Darnell*, 208 Va. at 677, 160 S.E.2d at 750; *Howard v. Warden, Buckingham Correctional Center*, 232 Va. 16, 19, 348 S.E.2d 211,

213 (1986); *Cooper v. Haas*, 210 Va. 279, 281, 170 S.E.2d 5, 7 (1969). As Mr. Kulp, Senior Assistant Attorney General, said, "the case law is clear." (J.A. 280)

The evidence at trial confirmed that there is no authority for appointment of counsel prior to the filing of a habeas petition, and that appointment at a later stage is erratic. Petitioners did not offer evidence of a single instance in which, prior to the filing of a petition, an unrepresented inmate was appointed counsel. Respondents are aware of none. The two instances cited by Petitioners as examples of such appointments are hardly persuasive. In both cases, the court merely appointed volunteers recruited by Ms. Deans (and for one, appointment came only *after* the petition was filed). (J.A. 109, 191, 325, 326-27) For an inmate such as Earl Washington (pp. 2-5 *supra*), who cannot find a volunteer to take his case, these examples are meaningless.

In addition, the record reveals six cases -- including one of the two instances Petitioners cite where counsel was in fact appointed -- in which the Commonwealth *opposed* appointment. (J.A. 98, 133, 138-39, 190-93, 323-24, 326-28) The Commonwealth, which at the time of trial had twelve lawyers representing it in capital post-conviction proceedings (Plaintiffs' Amended Proposed Findings of Fact and Conclusions of Law, Ex. 3), has been quite successful in arguing that its adversaries should not have lawyers: The record included three instances in which Virginia state courts denied motions for appointment of post-conviction counsel (J.A. 101, 191, 192, 314, 329), and three times when a Virginia federal court denied appointment. (J.A. 193, 297-98)

In short, prior to the filing of a state habeas petition, there is no provision of counsel. Later, counsel may be appointed, but often is not.

3. Meaningful Access Requires the Continuous Services of an Attorney

Finally, the district court found that even if one assumed, contrary to the evidence, that the assistance of institutional attorneys and court-appointed counsel were definitely available, this combined assistance is still not adequate to provide meaningful access to state post-conviction remedies:

The matter of a death row inmate's habeas corpus petition is too important -- both to society, which has a compelling interest in insuring that a sentence of death has been constitutionally imposed, as well as to the individual involved -- to leave to, what is at best, a patchwork system of assistance. These plaintiffs must have the continuous assistance of counsel in developing their claims.

668 F. Supp. at 515. Because of the unique circumstances of capital post-conviction proceedings, the district court concluded that "only the continuous services of an attorney to investigate, research, and present claimed violations of fundamental rights provides them the meaningful access to the courts guaranteed by the Constitution." 668 F. Supp. at 514.

As described above (pp. 12-17), the complexity of capital cases in light of the time constraints and emotional toll of Death Row requires that a lawyer research and present a Death Row inmate's claims. (*See also* J.A. 67) But, in addition, only a lawyer can conduct the type of factual investigation that is of special importance in capital post-conviction proceedings. (J.A. 57, 65) As Mr. Boger testified, a complete factual investigation is necessary "because in the vast majority of cases where that kind of factual research is done serious constitutional errors in our experience have emerged." (J.A. 55)

"Continuous" services are vital because, as Mr. Boger stated, if a Death Row inmate changes counsel,

As a practical matter it is a disaster. It is almost unthinkable, because as I described the process of investigating both legal and factual, one must do a lot of research, and unless one writes memos to the files on every item, every witness one talks with, every item of information one obtains, that becomes part of the common fund of knowledge and memory that may form a later judgment about what is a good legal issue or what the factual point to pursue is. That all gets lost if new counsel comes in that hasn't done that work.

(J.A. 64) Plaintiffs' second expert witness, Robert Hall, expressed the same opinion. (J.A. 102, 111-12) Moreover, in a capital case, the courts will very rarely be willing to allow a new lawyer the same "start up" time -- to become familiar with the case -- that they might allow in an ordinary civil case. (J.A. 80) Thus, because of the shortness of time and the factual and legal complexity, changing lawyers at just the federal courthouse door -- to say nothing of multiple changes in counsel prior to that point as anticipated by Petitioners (J.A. 272-73, 280-81, 286; Dx 19) -- would have, as the district court found, "catastrophic effects." 668 F. Supp. at 517.

C. Volunteer Attorneys Are Not Available in Virginia To Meet the Needs of Death Row Inmates

Having found that Virginia lacks a system that provides meaningful access to post-conviction remedies for indigent Death Row inmates, Judge Merhige considered whether volunteer lawyers are available to assume post-conviction representation. He found that they are not:

The evidence conclusively establishes that today few -- very few -- attorneys are willing to voluntarily represent death row inmates in post conviction efforts. . . . In view of the scarcity of competent and willing counsel to assist indigent death row inmates in their exercise of seeking post conviction relief, some relief is both necessary and warranted.

668 F. Supp. at 515.

The consequence of the lack of volunteers is that inmates are unable to file state post-conviction proceedings for extended periods of time. The effect of such delays, Judge Merhige found, "may be devastating." 668 F. Supp. at 515 n.2. And, as previously outlined, the volunteer system completely failed with regard to Earl Washington. Thus, if Virginia's Death Row inmates are left to rely solely on volunteer counsel, there can be no meaningful access -- and no post-conviction review -- for them.

SUMMARY OF ARGUMENT

The courts below painstakingly followed the directions laid down by this Court in *Bounds v. Smith*, 430 U.S. 817 (1977). The

district court conducted a thorough factual inquiry into the special needs of Virginia Death Row inmates in state post-conviction proceedings, the assistance provided by the Commonwealth, and the adequacy of this assistance to provide meaningful access. Based on these facts and further evidence of the critical importance of representation in such proceedings, the district court found that representation is required to ensure meaningful access. The court, exercising its discretion, thereupon ordered Virginia officials to develop a program or system for providing representation prior to the filing of a state habeas petition -- "a slight modification of the current assistance." 668 F. Supp. at 515. The district court's findings, conclusion, and remedy all comprise a conventional application of *Bounds* in an extraordinary context. Nothing in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), the case on which Petitioners base their appeal, suggests that such analysis is improper or that district courts have no power to grant such relief.

Petitioners now demand that this Court retry the case. The Court need not, however, determine what it would have decided had it observed the witnesses, listened to their testimony, and sifted through the documentary evidence. This Court held in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), that such responsibilities are the province of the district courts; appellate courts may not usurp their power.

With neither the law nor the facts on their side, Petitioners resort to conjuring up a weary parade of horrors that the decisions below will allegedly encourage. Yet, in suggesting that the provision of meaningful access will lead to endless challenges of the effectiveness of post-conviction counsel, Petitioners conveniently ignore their oft-cited *Finley* case. In *Finley*, this Court flatly prohibited such challenges unless based on a right to counsel -- not a right of meaningful access. Petitioners' further fears -- that forcing the Commonwealth to litigate against lawyers instead of against unrepresented Death Row inmates could impede the expeditious administration of executions -- are similarly unfounded. States that provide counsel have not been stymied from executing some of those lawyers' clients.

Moreover, there are independent, alternative bases to support the decisions below. The evolving standards of decency underlying the Eighth Amendment would in 1989 be offended by executions of those who cannot begin habeas proceedings because they are unrepresented. Finally, any weighing of the private versus the public interests in light of the risks of an erroneous execution without such representation, pursuant to the due process clause of the Fourteenth Amendment, mandates the provision of counsel.

ARGUMENT

I. IN ORDER TO OBTAIN THE MEANINGFUL ACCESS TO STATE POST-CONVICTION PROCEEDINGS GUARANTEED BY *BOUNDS v. SMITH*, DEATH-SENTENCED PRISONERS MUST BE REPRESENTED BY COUNSEL

In *Bounds v. Smith*, 430 U.S. 817, 828 (1977), this Court emphatically reaffirmed that inmates have a "fundamental constitutional right of access to the courts." This right requires states to provide all prisoners with "adequate law libraries or adequate assistance from persons trained in the law." *Id.*

The right of meaningful access is the most important right a prisoner holds; without it, he has no means of securing any other rights. *Adams v. Carlson*, 488 F.2d 619, 630 (7th Cir. 1973). For Death Row prisoners seeking to begin habeas proceedings, this right to petition the courts has unique significance: It has meant the difference between life and death for more than half of those who have exercised it. (*Supra* at 7-8)

Petitioners insist, however, that this "fundamental right" may be satisfied with form instead of substance. Seizing upon this Court's use of the disjunctive in describing acceptable remedies, they urge that if a state provides a law library, that ends all inquiry: No court may look beyond the fact of the library's existence to determine whether *all* inmates are actually receiving meaningful access to the courts. In other words, a blind prisoner would have to make do with a law library filled with books he could not read.

Not surprisingly, neither this Court nor any of the lower courts construing *Bounds* has ever adopted Petitioners' formalis-

tic interpretation of the right of access to the courts. To the contrary, *Bounds*, its ancestors, and its progeny squarely reject Petitioners' approach in favor of an analysis that focuses on whether a state's program of assistance *in fact* provides meaningful access for all prisoners, including those with special disabilities and circumstances.

Indeed, this Court made quite clear in *Bounds* that, grammatical connectors notwithstanding, the existence of a law library does not necessarily ensure meaningful access. Specifically, this Court identified two cases where it had held that -- despite the existence of presumably adequate law libraries -- certain classes of inmates were deprived of access to the courts. *Id.* at 824 and nn.10, 11 (citing *Wolff v. McDonnell*, 418 U.S. 539 (1974) (granting relief even though "there was already an adequate law library in the prison") and *Procunier v. Martinez*, 416 U.S. 396 (1974) (granting relief "even though California has prison law libraries")). Thus, no reading of *Bounds* supports the contention that a state may furnish a law library and automatically be done with ensuring meaningful access.

This Court further emphasized in *Bounds* that providing "access to the courts" for some, or even most, inmates is not enough. That access must extend to "all prisoners" and it must be "adequate, effective, and meaningful." *Id.* at 822, 824 (emphasis added). For example, *Bounds* distinguished "the access rights of ignorant and illiterate inmates . . . unable to present their own claims in writing to the courts" from those of "inmates able to present their own cases." *Id.* at 823-24. This Court noted that for illiterate inmates, a law library alone is not sufficient -- meaningful access "require[s] at least allowing assistance from their literate fellows." *Id.* (citing *Johnson v. Avery*, 393 U.S. 483 (1969)) (emphasis added).

Following *Bounds*, the Courts of Appeals have also recognized that under certain circumstances, inmates may require more assistance than a law library.⁶ In so doing, these courts have carefully adhered to this Court's instructions that "[a]ny plan, however,

⁶ Thus, the Third, Fourth, and Fifth Circuits have all acknowledged that a library alone may not provide meaningful access for illiterate or non-English speaking inmates or prisoners in close custody. See *Valentine v. Beyer*, 850 F.2d 951, 956-57 (3d Cir. 1988) (affirming district court's order prohibiting the state

must be evaluated as a whole to ascertain its compliance with constitutional standards." *Bounds*, 430 U.S. at 832.⁷

A. The Decisions Below Represent a Conventional Application of *Bounds* Jurisprudence

This case presents the ultimate question of "meaningful access to the courts." It involves condemned prisoners in Virginia, laboring under severe constraints unique to Death Row, who will forever lose their opportunity to be heard if they fail to promptly file state habeas corpus petitions. As Justice Brennan noted in *Furman v. Georgia*, 408 U.S. 238 (1972), inmates who are executed lose "the right to have rights"; dead prisoners are permanently deprived of "the right of access to the courts." 408 U.S. at 290. No right to assistance "in the preparation and filing of meaningful legal papers" can therefore be so important as the right of a Virginia Death Row inmate to file a state habeas petition, the "most

from closing a paralegal clinic, based on the district court's factual findings regarding the assistance provided by the clinic, the inadequacy of the State's proposed plan, and the special needs of close custody, illiterate, and non-English speaking inmates); *Cruz v. Hauck*, 627 F.2d 710, 721 and n.21 (5th Cir. 1980) (holding that "[l]ibrary books, even if 'adequate' in number, cannot provide access to the courts for those persons who do not speak English or who are illiterate," and ordering the district court to "look at all the circumstances to determine whether all inmates have meaningful access to the courts") (emphasis original); *Harrington v. Holshouser*, 741 F.2d 66, 69 (4th Cir. 1984) (requiring program of trained paralegals in addition to law libraries).

⁷ The district courts have reached the same conclusion. See *Hadix v. Johnson*, 694 F. Supp. 259, 288-89 (E.D. Mich. 1988) (requiring prison legal services program for illiterate inmates and those in segregation); *United States ex rel. Para-Professional Law Clinic v. Kane*, 656 F. Supp. 1099, 1104-06 (E.D. Pa. 1987), *aff'd without opinion*, 835 F.2d 285 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988) (requiring paralegal clinic in addition to law library to assist illiterate inmates and those in administrative or disciplinary custody); *Knop v. Johnson*, 655 F. Supp. 871, 882 (W.D. Mich. 1987) (illiterate inmates not provided with meaningful access by law library); *Cody v. Hillard*, 599 F. Supp. 1025, 1061 (D.S.D. 1984) (requiring "law-trained assistance" in addition to law library); *Kendrick v. Bland*, 586 F. Supp. 1536, 1549, 1551 (W.D. Ky. 1984) (law library alone "does not provide the minimum necessary legal resources"); *Wade v. Kane*, 448 F. Supp. 678, 684 (E.D. Pa. 1978), *aff'd mem.*, 591 F.2d 1338 (3d Cir. 1979) ("[I]t is obvious that a prison library, even where it is adequate, is insufficient to provide [adequate] access for inmates who are illiterate or otherwise unable to do effective legal research.").

critical single document in the capital litigation." 430 U.S. at 828. (J.A. 55)

As this Court recognized in *Bounds*, the amount of legal assistance required for meaningful access varies depending on the nature of the proceeding. Thus, this Court found that prisoners filing "original actions seeking new trials, release from confinement, or vindication of fundamental civil rights" need more assistance in obtaining adequate, meaningful, and effective access to the courts than prisoners asking a court to exercise discretionary review of lower court decisions. 430 U.S. at 827-28. Such original proceedings, "the first line of defense against constitutional violations," require additional legal assistance because of their "fundamental importance." *Id.* at 827.⁸

Habeas proceedings in *capital* cases, however, are more than the first line of defense against constitutional violations; they are also the last. The outcome of such proceedings, if allowed to occur, will determine whether the prisoner lives or dies. The exponentially magnified importance of habeas proceedings, and the nature and degree of risk to Death Row inmates if these proceedings cannot take place, cry out for a heightened level of legal as-

⁸ In requiring legal assistance in *Bounds*, this Court also considered the fact that habeas proceedings "frequently raise heretofore unlitigated issues." The importance of this factor is also magnified in Virginia capital habeas proceedings. In these proceedings, Death Row inmates seek to assert claims that have not been, and could not have been, addressed on direct appeal — claims that will determine whether a death sentence was properly imposed. As this Court noted in *Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986), asserting claims of ineffective assistance of trial counsel in post-conviction proceedings is frequently the only means through which an accused can effectuate the right to counsel and is the *only* means of enforcing the right to effective assistance of appellate counsel. In addition, potentially meritorious constitutional claims omitted at trial — and therefore not heard on appeal, Va. Supreme Court Rule 5:25 — or on appeal will only be reviewed, if ever, in post-conviction proceedings as instances of ineffective assistance of counsel or upon a showing of cause and prejudice. See *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (with respect to claims omitted by counsel, "[t]here is an additional safeguard against miscarriages of justice in criminal cases. . . . That safeguard is the right to effective assistance of counsel."). Finally, prosecutorial misconduct in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), will rarely appear in the record; challenges under *Brady* are therefore usually raised for the first time in habeas proceedings.

sistance. Accordingly, Judge Merhige found that "[t]he stakes are simply too high" to permit the Commonwealth to get by with minimal access.

In reaching this conclusion, the district court examined whether, in light of the fundamental importance of these proceedings, Virginia Death Row inmates were capable of using law libraries to obtain a meaningful opportunity for collateral review. The court focused on the tasks facing condemned prisoners in these proceedings and on limitations affecting their ability to perform those tasks. *See Bounds*, 430 U.S. at 825:

It would verge on incompetence for a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and defendant, and types of relief available. Most importantly, of course, a lawyer must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action.

For Virginia's Death Row inmates, the uncontradicted evidence demonstrated that the work necessary for filing and litigating a state habeas petition in a capital case is far more difficult and substantial than the tasks outlined in *Bounds* (tasks which required only a law library), including extensive factual investigation, identification and research of numerous substantive claims (in a rapidly changing area of the law) and negotiation of the complicated procedural obstacles. The district court found, however, that not only is such work extremely complex, but this "large amount of legal work must be compressed into a limited amount of time." 668 F. Supp. at 513. And this work, which is directed toward staying alive, must be accomplished at a time when the inmate is preparing to die. *Id.* The district court found that these circumstances disable Death Row inmates from proceeding *pro se* in habeas proceedings:

[P]laintiffs are incapable of effectively using lawbooks to raise their claims. Consequently, the provision of a law library does little to satisfy Virginia's obligation to "assist inmates in the preparation of meaningful legal

papers" with respect to Virginia death row prisoners. *See Bounds*, *supra*, 430 U.S. at 828.

Id. Indeed, Defendants offered no evidence otherwise.

Under *Bounds*, if a law library is not sufficient to provide adequate, effective, and meaningful access, then the State must provide "adequate assistance from persons trained in the law." 430 U.S. at 828. The district court therefore reviewed the capability of Virginia's alternate forms of assistance to ensure adequate, effective, and meaningful access. *See Valentine v. Beyer*, 850 F.2d 951, 956-57 (3d Cir. 1988) (examining adequacy of state's proposed plan of alternative assistance); *Cruz v. Hauck*, 627 F.2d 710, 721 (5th Cir. 1980) (ordering district court to examine adequacy of alternative forms of assistance). It found that this additional assistance, when evaluated as a whole, as required by *Bounds*, still did not assure adequate, effective, and meaningful access for Death Row inmates, in light of the extraordinary importance of the remedies they sought to pursue:

The matter of a death row inmate's habeas corpus petition is too important -- both to society, which has a compelling interest in insuring that a sentence of death has been constitutionally imposed, as well as to the individual involved -- to leave to, what is at best, a patchwork system of assistance.

668 F. Supp. at 515. The court thus followed precisely the analysis laid out in *Bounds* and subsequent decisions: In evaluating the importance of the proceedings and the actual capabilities of Plaintiffs, the district court focused, as mandated by *Bounds*, on whether Plaintiffs *in fact* receive meaningful access. This was, therefore, a faithful application of *Bounds* principles in a unique context.⁹

B. The Assistance of Lawyers is an Appropriate Remedy Under *Bounds*

Petitioners' real dissatisfaction with the decisions below is not the courts' application of the *Bounds* principles, but the

⁹ The sole case cited by Petitioners in support of their remarkably restrictive reading of *Bounds*, *Hooks v. Wainwright*, 775 F.2d 1433 (11th Cir. 1985), must be viewed in light of its actual holding: "We hold the district court erred in requiring

remedy. Once a district court finds a constitutional violation, however, it has broad discretion to fashion appropriate relief. As this Court said in *Hutto v. Finney*, 437 U.S. 678 (1978), "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Id.* at 687 n.9 (quoting *Millikin v. Bradley*, 433 U.S. 267, 281 (1977)).

The district court, after finding that Defendants' law library failed to ensure meaningful access for Death Row inmates, was then obligated "using the alternatives set out in *Bounds* [to] fashion a remedy which, under the circumstances . . . [would] provide meaningful relief." *Battle v. Anderson*, 457 F. Supp. 719, 737 (E.D. Okla. 1978), *remanded on other grounds*, 594 F.2d 786 (5th Cir. 1979). The Court in *Bounds* enumerated various means by which a state could provide such assistance. *Id.* at 830-32. The district court concluded, on the basis of the factual record before it regarding capital post-conviction proceedings, that only the continuous services of an attorney would ensure the access required by *Bounds*. It further concluded that Virginia did not currently provide that assistance.

Nevertheless, rather than imposing on Virginia any particular mechanism for providing this assistance -- as Defendants claim -- the court gave Defendants the discretion to propose the form such assistance should take. Noting that "only a slight modification of the current assistance" was necessary, 668 F. Supp. at 515, the court simply ordered Defendants to develop "a system" or "a program" that would ensure that each Death Row inmate was individually represented by a lawyer. (Pet. at A-23, -33) This was the very approach approved in *Bounds* itself:

Petitioners' hyperbolic claim [of a federal intrusion into state authority] is particularly inappropriate in this case, for the courts below scrupulously respected the limits

that any Florida library plan, devised to ensure constitutional access to the Courts by state inmates, must include a provision for attorney assistance." *Id.* at 1438 (emphasis original). In *Hooks*, the district court had issued the broadest possible order, requiring the assistance of lawyers for all inmates for all types of cases.

on their role. The District Court initially held only that petitioners had violated the "fundamental constitutional guarantee," *ibid.*, of access to the courts. It did not thereupon thrust itself into prison administration. Rather, it ordered petitioners themselves to devise a remedy for the violation

430 U.S. at 832.

Defendants never devised any plan for a system or program, however. Instead, they appealed, arguing that a United States District Court may *never*, under any circumstances, devise a remedy for a *Bounds* violation that requires a state to develop a system for providing legal assistance in the form of lawyers.

The courts construing *Bounds* have not adopted Petitioners' rigid rule. They, like the courts below, have ordered the provision of lawyers as a remedy when inmates would not otherwise receive meaningful access. For example, the Fourth Circuit found, in a later proceeding in *Bounds* itself, that the district court appropriately ordered the remedy of a prison legal services program when, after ten years, "North Carolina was unable or unwilling to implement its library plan consistent with minimum constitutional requirements" and had thus failed to provide meaningful access to the courts. *Smith v. Bounds*, 813 F.2d 1299, 1304-05 (4th Cir. 1987), *opinion adopted en banc*, 841 F.2d 77 (4th Cir. 1988), *cert. denied*, 109 S.Ct. 176 (1988). The Fourth Circuit noted that this "remedy flowed logically from *Bounds*." 813 F.2d at 1302.

Likewise, when the *only* way a Death Row inmate can obtain meaningful post-conviction review is through the assistance of a lawyer, requiring a state to provide counsel flows logically from *Bounds*. Indeed, after the Fourth Circuit's *en banc* decision below, the Third Circuit similarly concluded that, for Death Row inmates in post-conviction proceedings, meaningful access may call for the provision of counsel:

[T]he Court in *Bounds* did not suggest that the right of access to the courts is always to be measured by a single invariant standard irrespective of the nature of the proceedings. It may well be that the scope of access to legal resources required under *Bounds* varies according

to the proceeding. In proceedings directly implicating the validity of a death-sentenced prisoner's conviction, the availability of legal assistance from lawyers, rather than from other sources of legal knowledge, is more central to the vindication of prisoners' claims than in other civil claims filed by a death-sentenced prisoner, such as, for example, those complaining of conditions of confinement.

Peterkin v. Jeffes, 855 F.2d 1021, 1047 (3d Cir. 1988).

Nevertheless, Petitioners contend that in the post-conviction context, *Pennsylvania v. Finley*, 107 S.Ct. 1990 (1987), precludes the district court's remedy. In *Finley*, a noncapital case, this Court held that the procedural framework of *Anders v. California*, 386 U.S. 738 (1967), does not apply to Pennsylvania post-conviction lawyers seeking to withdraw from representation because there is no "constitutional right to counsel" for post-conviction proceedings. 107 S. Ct. at 1993 (emphasis added). But, in so stating, the Court pointed out that the provision of post-conviction counsel may arise from various legal sources besides a "right to counsel."

Respondent apparently believes that a "right to counsel" can have only one meaning, no matter what the source of that right. But the fact that the defendant has been afforded assistance of counsel in some form does not end the inquiry for federal constitutional purposes. Rather, it is the source of that right to a lawyer's assistance, combined with the nature of the proceedings, that controls the constitutional question.

107 S. Ct. at 1994. *Bounds* is just such another "source."

As the Fourth Circuit pointed out (847 F.2d at 1122), nothing in *Finley* suggests that this Court meant to limit in any way the relief that a district court could order to remedy a *Bounds* violation. There is no mention of *Bounds* in the *Finley* decision. And *Bounds* itself specifically rejected the argument that *Ross v. Moffitt*, 417 U.S. 600 (1974) – the analytical underpinning for *Finley* – in any way limited the scope of relief available to ensure meaningful access. 430 U.S. at 827. Had this Court intended *Finley* to have the far-ranging preclusiveness Petitioners now urge, the

Court would have had to address *Bounds*.¹⁰ Supreme Court decisions spawning more than 500 published opinions in the federal reporters are not overruled, or substantially limited, *sub silentio*.

Moreover, neither *Finley* nor *Ross* involved or addressed the situation of a man on Death Row. The capital nature of this case is key. When there is a risk of a wrongful execution, a mechanical application of the analysis in *Finley* and *Ross* does not accord with fundamental fairness or with the principles underlying those decisions. The Fourth Circuit correctly concluded: "We do not . . . read *Finley* as suggesting that . . . counsel cannot be required under the unique circumstances of post-conviction proceedings involving a challenge to the death penalty." 847 F.2d at 1122.

As a result of these "unique circumstances," found by both the district court and the Fourth Circuit, a Death Row inmate pursuing post-conviction relief will not, in the absence of representation, have the "adequate opportunity to present his claims fairly" acknowledged by both *Ross* and *Finley*. *Ross*, 417 U.S. at 612, 616; accord *Finley*, 107 S.Ct. at 1993-94. Indeed, the inevitable execution that will result from the absence of a lawyer to obtain a stay will eliminate any possibility of review at all.¹¹

¹⁰ The single mention of the phrase "the equal protection right of meaningful access", 107 S.Ct. at 1994, does not support such a substantial modification of the *Bounds* Fourteenth Amendment right to meaningful access to the courts. On numerous occasions, this Court has used the concept of "access" generically without any intention of referring to the right of access to the courts protected by *Bounds*. See, e.g., *Roberts v. Lavalley*, 389 U.S. 40, 42 (1967) (referring to "access to the instruments needed to vindicate legal rights"); *Burns v. Ohio*, 360 U.S. 252, 259 (1959) (filing fee "foreclose[s] indigents from access to . . . phase of the procedure").

¹¹ *Bounds* itself distinguished *Ross* on the grounds that courts engaged in discretionary review generally "are not concerned with the correctness of the judgment below." 430 U.S. at 827. For Death Row prisoners in Virginia, however, post-conviction review is directly concerned with whether the conviction and sentence is correct. Further, in both *Finley* and *Ross*, the petitioners sought to raise claims that had already been litigated and ruled upon previously. Because of that repetition of litigation, the petitioner's rights could be adequately protected by the existence of transcripts and prior briefs and opinions discussing the very questions to be reviewed a second time. The same is *not* true for capital post-conviction proceedings in Virginia. (*Supra* at 29)

Petitioners contend, however, that this Court should ignore entirely the capital nature of this case on grounds that, once a person's death sentence is affirmed on direct appeal, there is a radical transformation: The sanction of death is no longer different. (Br. at 18-20) This surrealistic view -- rejected by both the district court and the Fourth Circuit -- is entirely irrelevant to the actuality of an unrepresented man sitting in the death house at the Virginia State Penitentiary, a few steps away from the electric chair, unable to visit a law library, waiting to die. Moreover, this odd contention ignores the very reason why this Court has held that "death is different." "One of the principal reasons why death is different is because it is irreversible; an executed defendant cannot be brought back to life." *Woodson v. North Carolina*, 428 U.S. 280, 323 (1976) (Rehnquist, J., dissenting). See also *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring) ("In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases.") It is *finality* that makes the death sentence different -- regardless of the stage of the proceedings. If a mistake is discovered after the state has carried out the order of execution, that mistake can never be corrected. And somebody will have died in error.¹²

C. The District Court's Findings of Fact are Binding on Appeal

Judge Merhige's findings regarding (1) death row inmates' special circumstances, (2) the type of assistance necessary, and (3) the assistance actually available in Virginia are unquestionably findings of fact that, under Federal Rule of Civil Procedure 52(a), "shall not be set aside unless clearly erroneous." The Fourth Circuit, after reviewing the evidence, stated, "we cannot say these findings of fact are clearly erroneous." 847 F.2d at 1121.

This Court has repeatedly emphasized that the "clearly erroneous" standard is an extraordinarily deferential one. *Anderson*

¹² Petitioners' extensive argument that "death is not different" as a matter of law is also merely a transparent attempt to circumvent the district court's factual findings that the fact of being on Virginia's Death Row results in unique constraints on an inmate's ability to exercise his right to pursue post-conviction proceedings without the assistance of a lawyer.

v. City of Bessemer City, 470 U.S. 564, 573-74 (1985). Where, as Defendants urge here, "there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.*¹³ In addition, since the district court findings are to a great extent based on determinations regarding the credibility of witnesses -- including the nature of the actual assistance provided by institutional attorneys, the amount of assistance they could provide, and the abilities of Death Row inmates to proceed *pro se* -- "Rule 52(a) demands even greater deference . . ." *Id.* at 575. And the usual practice of this Court is to "accord great weight to a finding of fact which has been made by a district court and approved by a court of appeals" as was the case here. *N.C.A.A. v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984). See also *Graver Tank and Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.")

1. Death Row Inmates' Inability to Proceed *Pro Se* in Post-Conviction Proceedings

Not surprisingly, nowhere do Petitioners argue that Death Row inmates are capable of effectively representing themselves in state post-conviction proceedings -- the fundamental issue in this case. Nor do Petitioners ever dispute the district court's ul-

¹³ In a blatant attempt to sidestep Rule 52(a), Petitioners urge that the district court made no findings of fact, but rather relied on only "general policy considerations." (Br. at 25-26) Petitioners' labels cannot change the facts: Findings that capital cases are complex and involve severe time constraints, that Death Row inmates cannot conduct such litigation while preparing to die, that the institutional attorneys do not and cannot provide sufficient assistance, and that appointment of counsel is not guaranteed unless the court orders an evidentiary hearing are not mere "general policy considerations," but ultimate findings of fact based on the evidence. It does not matter whether the trial court states only factual conclusions -- that is still "no excuse for the Court of Appeals to ignore the dictates of Rule 52(a) and engage in impermissible appellate factfinding." *Amadeo v. Zant*, 108 S.Ct. 1771, 1780 (1988).

timate finding that -- if the circumstances of capital litigation are as the court found -- counsel is necessary to ensure meaningful access to the courts for state post-conviction proceedings. Instead, Petitioners attack, attempting a divide-and-conquer strategy, the three specific factors that the court considered in reaching its conclusion. What is distinctive about capital cases, however, is not the existence of each of these factors, but the fact that the three factors converge: A Death Row inmate is required, in order to save his life, to litigate a complex case under tight time constraints while preparing to die. As this Court stated in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), plaintiffs must be given "the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each."

In any event, Petitioners' *post hoc* rationalizations regarding the individual factors are superficial. They contend that no time constraints exist because "stays of execution *may* be granted to permit the inmate additional time to prepare and present his petition to the appropriate courts." (Br. at 29 n.9; emphasis added) This concession that stays are merely possible -- not guaranteed -- speaks for itself. In fact, obtaining a stay when there is not already an action pending is procedurally impossible. Even in the context of pending proceedings, stays are hardly granted as lightly as extensions of time. The inmates who have survived on Death Row for years have done so only because they had lawyers to do a massive amount of work in a very limited period of time in order to obtain a stay of execution. Unrepresented inmates such as Messrs. Boggs and Watkins have survived only because of the existence of this lawsuit. (J.A. 349-50, 366)

As for the difficulty of the legal work, Petitioners feebly state that "there is no evidence that the inmates on Virginia's death row are uniformly disabled from making any effort to research and develop claims using a law library." (Br. at 29) This assertion is simply beside the point. The ability of a Death Row inmate to research a civil rights claim -- such as whether a prison may open mail from a paralegal -- hardly ensures that the same inmate, with his life at stake, will be able to prepare a complete state habeas corpus petition (including *all* possible claims on pain of waiver) and

to prosecute that petition through the state system.¹⁴ Likewise, it is irrelevant that there may be other criminal matters as complex as a capital case. An inmate convicted of violating the RICO Act will have the rest of his natural life to try to overturn his conviction. If a death-sentenced prisoner fails to research a host of claims adequately, investigate facts from Death Row, review the constantly changing case law, and master the procedural maze of capital and habeas law all in a period as short as 15-30 days, he will die. With him will expire potentially meritorious claims of innocence or violations of the Constitution.

Finally, Petitioners make light of the district court's finding "that an inmate preparing himself and his family for impending death is incapable of performing the mental functions necessary to adequately pursue his claims." 668 F. Supp. at 513. Defendants stand alone in their view. Justice Powell wrote in *Ford v. Wainwright*, 477 U.S. 399, 421 (1986), "It is as true today as when Coke lived that most men and women value the opportunity to prepare, mentally and spiritually, for their death." In *Furman v. Georgia*, 408 U.S. 238, 288-89 (1972), Justice Brennan noted almost twenty years ago:

[W]e know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death. . . . As the California Supreme Court pointed out, "the process

¹⁴ Petitioners' emphasis on mere research and development of claims misconstrues the scope of the *Bounds* right to meaningful access. Access also includes the ability to conduct a factual investigation and requires that an inmate not only get to the courthouse door, but also be able to prosecute his claims. *Bonner v. City of Prichard*, 661 F.2d 1206, 1212-13 (11th Cir. 1981) (en banc) (meaningful access reaches beyond the mere filing of a lawsuit); *Germany v. Vance*, 673 F. Supp. 1143, 1150 (D. Mass. 1987) (barring access to factual information violates *Bounds*). See also *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) ("mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process . . ."); *McKeever v. Israel*, 689 F.2d 1315, 1320 (7th Cir. 1982) (appointment of counsel warranted in § 1983 case when indigent unable to conduct suitable factual investigation).

of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture." *People v. Anderson*, 6 Cal 3d 628, 649, 493 P2d 880, 894 (1972). Indeed, as Mr. Justice Frankfurter noted, "the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon." *Solesbee v. Balkcom*, 339 US 9, 14 (1950) (dissenting opinion).

See also *Furman*, 408 U.S. at 382 (1972) (Burger, C.J., dissenting) ("a man awaiting execution must inevitably experience extraordinary mental anguish"); Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. Crim. Law & Criminol. 860 (1983) (collecting studies). It is remarkable that Petitioners contend otherwise.

2. The Legal Assistance Available to Virginia's Death Row Inmates

Defendants bore the burden of demonstrating the adequacy of the assistance they provide. *Storseth v. Spellman*, 654 F.2d 1349, 1352 (9th Cir. 1981); *Rich v. Zitnay*, 644 F.2d 41, 43 (1st Cir. 1981). Defendants failed to meet that burden at trial; their present quarrel with the facts adds nothing more.

As for the assistance of the institutional attorneys, Petitioners merely contend -- without arguing that the court's findings were clearly erroneous -- that the district court adopted the wrong view of the evidence. Four institutional attorneys testified. The district court heard their testimony, asked its own questions, considered all the testimony carefully, decided which witnesses to credit, and drew conclusions from that testimony as to the assistance they actually provided and as to what additional assistance these lawyers were capable of providing. This careful weighing of testimony is precisely the situation described in *Anderson*, 470 U.S. at 578, when a finding "can virtually never be clear error."

With respect to court-appointed counsel, Petitioners complain that the district court did not give sufficient consideration to the possibility that counsel *might* be appointed. The issue, however, is not what is theoretically available for one inmate, but whether, by virtue of Va. Code § 14.1-183, all Death Row inmates

are in fact receiving adequate, effective, and meaningful access. This Court has already held in *Bounds* that the mere possibility that a judge might appoint counsel, such as Va. Code § 14.1-183 provides, is insufficient to ensure meaningful access to the courts: "[I]t is irrelevant that North Carolina authorizes the expenditure of funds for appointment of counsel in some state post-conviction proceedings for prisoners whose claims survive initial review by the courts." *Bounds*, 430 U.S. at 828 n.17.

Likewise, the Third Circuit has held that statutes -- identical to the statute at issue here -- that "hold out the possibility to a capital prisoner that a court to which he submits a habeas . . . petition may see fit to appoint lawyers" and do not mandate the appointment of counsel for preparation of the pleadings and subsequent litigation, "do not by themselves fulfill the Commonwealth's obligation under *Bounds* to ensure that prisoners on death row have access to the courts." *Peterkin v. Jeffes*, 855 F.2d 1021, 1045-46 (3d Cir. 1988); *Id.* at 1043 (statute that does not require assistance at pleading stage is insufficient). See also *Buise v. Hudkins*, 584 F.2d 223, 228 (7th Cir. 1978), *cert. denied*, 440 U.S. 916 (1979) (it is irrelevant that some inmates may have received assistance under a statute because *Bounds* requires more than the "mere availability" of assistance).

Finally, Petitioners have not addressed the district court's finding that even if Virginia's proposed -- although to date hypothetical -- "system" of institutional and possible court-appointed attorneys were in place, it would not be adequate. 668 F. Supp. at 515. Instead, Defendants adopt a not-so-novel defense: They blame the victims of Defendants' own inaction. Defendants contend that any lack of access is the fault of the inmates for failing to use the "patchwork" system they assert is already in place. This argument ignores Plaintiffs Boggs and Watkins, who sat on Death Row for a year without receiving any help whatsoever despite numerous requests that this "system" assist them.

Earl Washington's predicament demonstrates the ephemeral nature of Petitioners' proposed "system". Mr. Washington or others acting on his behalf took every step Petitioners assert is necessary to receive assistance through their system. The result: Mr. Washington was nearly put to death.

Petitioners suggest that inmates move for the appointment of counsel prior to the filing of a habeas petition. When Mr. Washington's *trial and direct appeal* attorney made a motion for appointment of habeas corpus counsel at the hearing to set his execution date, the circuit court denied the motion. In defending this denial, Petitioners simply say "[n]o habeas corpus actions had been filed on Washington's behalf at that time." (Br. at 28) That is precisely the problem; what Mr. Washington needed was a lawyer to help him research, prepare, and file a petition. But, as Judge Merhige found, "appointments are made under this provision only after a petition is filed. . . ." 668 F. Supp. at 515.

Following this denial, Mr. Washington received no assistance from the institutional attorneys, although Mr. Giarratano contacted them on his behalf. (J.A. 204, 294) Petitioners suggest that the inmate merely indicate "to anyone that he want[s] to file a petition." (J.A. 284) Ms. Deans notified the Attorney General's Office repeatedly that Mr. Washington wanted to file a habeas action, but could not find an attorney. (J.A. 292-93) Petitioners also suggest that the inmate write a letter asking for counsel and "send it down to Judge Merhige, or anybody else." (J.A. 284, 274) Mr. Giarratano, acting on behalf of the mentally retarded Mr. Washington, did precisely that -- and sent a copy of the letter to the Attorney General's Office. (J.A. 11-13) Nevertheless, Virginia continued its inexorable march towards Mr. Washington's execution. Mr. Washington -- who jumped through every hoop of Virginia's "system" -- would have died but for the aid of a volunteer.

Petitioners' system ensures nothing. At best, some death-sentenced prisoner may, if he is fortunate, obtain legal assistance. This Russian-roulette proposal ignores the fundamental principle of *Bounds*. "[O]ur decisions have consistently required States to shoulder affirmative obligations to assure *all* prisoners meaningful access to the courts." 430 U.S. at 824 (emphasis added).

D. Representation is the Only Possible Way to Bring Order Out of the Chaos of Capital Post-Conviction Litigation

In their ardor to distract this Court from the district court's findings of fact and its common sense analysis, Petitioners invoke

the spectre of "an endless succession of collateral proceedings in which the petitioner invokes a right to counsel to challenge the effectiveness of the next previous attorney." (Br. at 16) Petitioners' hysteria is unjustified. The possibility of such infinite delay no longer exists. Virginia has already jousted with this spectre -- and won.

When Richard L. Whitley attempted to urge this point, the Fourth Circuit held: "The sole question presented in this appeal is whether, in view of the case of *Giarratano v. Murray*, 668 F. Supp. 511 (E.D.Va. 1986), the performance of Whitley's attorneys in his state habeas petition should be judged by the constitutional standard of ineffectiveness of counsel. . . . *Finley* forecloses Whitley's contention on appeal." *Whitley v. Muncy*, 823 F.2d 55, 56 (4th Cir. 1987). See also *Finley*, 107 S.Ct. at 1994 ("it is the source of that right to a lawyer's assistance, combined with the nature of the proceedings, that controls 'whether one has the right to 'effective' assistance of counsel'"); *Mitchell v. Wyrick*, 727 F.2d 773, 774 (8th Cir. 1984), *cert. denied*, 469 U.S. 823 (1984) (no right to effective assistance of counsel in state post-conviction proceedings); *Howard v. Warden, Buckingham Correctional Center*, 232 Va. 16, 19, 348 S.E.2d 211, 213 (1986) (accord). The result of *Whitley* is self-evident, since a challenge to the effectiveness of habeas counsel in no sense attacks the legality of the conviction or sentence, a requisite of any habeas corpus action.

Mr. Whitley was executed four days after he invoked the *Giarratano* decision to challenge the effectiveness of his post-conviction attorney. The next inmate -- however unlikely -- to raise this issue in a habeas petition has little hope of deferring the finality of his sentence any longer than did Mr. Whitley.

While focusing on their unfounded apprehensions, Petitioners have failed to notice certain hard, cold facts that present the true dilemma. There are now 2,150 inmates in America under sentence of death, the highest total in our nation's history. More than half of these condemned inmates are still awaiting the outcome of their direct appeal; *they have not yet entered even the first stage of collateral review*. Wilson and Spangenburg, *supra*. In the near future, 1,216 death-sentenced prisoners will enter state post-conviction proceedings. *Id.* Al-

though almost all death penalty states will ensure counsel, Virginia will not (in the absence of an affirmance in this case).¹⁵

The result will be chaos. Although the Anti-Drug Abuse Act of 1988 provides for representation in federal habeas proceedings, the failure to provide representation at the state level will place an intolerable burden on the federal courts. Unrepresented inmates will be arriving at the federal courthouse door with a host of unexhausted claims, numerous procedural defaults, no findings of fact, and the inevitable need for an emergency stay -- all because of a lack of counsel. If, as Judge Merhige found, a *change* of counsel at the federal courthouse door would be "catastrophic", 668 F. Supp. at 517, consider a Death Row inmate arriving in federal court without ever having had an attorney review, research, and investigate claims never before raised.

The federal courts will be faced with making sense and order out of the madness. If the courts strictly apply the doctrines developed to preserve the integrity of state proceedings, capital inmates will be deprived of any meaningful collateral review and Congress's newly enacted right to counsel in federal court will be emasculated. If, however, the courts wish to ensure fairness, they will have to relax these well-established rules and essentially start from scratch in the review process. See *Jones v. Estelle*, 722 F.2d 159, 167 (5th Cir. 1983), *cert. denied*, 466 U.S. 976 (1984) ("Given this elemental role of counsel in our adversary system, we think it inevitable that the inquiry into excuse for omitting a claim from an earlier writ will differ depending upon whether petitioner was represented by counsel in the earlier writ prosecution.") It is thus deprivation of counsel -- not provision of counsel -- that will lead to a lack of finality and the federalization of state post-conviction proceedings.

The district court's remedy of providing for legal representation at an early stage is the only hope for eliminating the confusion that is now the hallmark of capital post-conviction litigation

¹⁵ Significantly, now that the issues in this case are clear, not a single state has joined Virginia in urging this Court to reverse the decisions below.

in Virginia. Defendants' own witness, Mr. Kulp, the Coordinator of all Capital Litigation in the Commonwealth, completely agreed:

Well, basically we want to see the inmate have an attorney at State Habeas for reasons of economy and efficiency. When you have a death case, we recognize that it is going to be prolonged litigation and we want to see all matters that the inmate or the petitioner wants to raise be raised at one proceeding, and we can deal more efficiently with an attorney. And we prefer that from an economy standpoint we don't have to have more than one proceeding.

(J.A. 272)

II. THE JUDGMENT MAY BE AFFIRMED ON THE BASIS OF ALTERNATIVE GROUNDS

"[T]he prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted." *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977). See also *Whitley v. Albers*, 475 U.S. 312, 326 (1986) ("Respondent correctly observes that any ground properly raised below may be urged as a basis for affirmance of the Court of Appeals' decision. . .").

In the courts below, Plaintiffs consistently argued that the Eighth Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Sixth Amendment, and the Suspension Clause of Article I all require a state to provide Death Row inmates with lawyers to represent them in state post-conviction proceedings. Although neither the district court nor the Fourth Circuit addressed these grounds (668 F. Supp. at 512; 847 F.2d at 120), each provides an independent basis for affirming the judgment below.

A. Counsel in State Post-Conviction Proceedings is Vital to Ensure that a Death Sentence is Not Imposed in an Arbitrary and Capricious Fashion

This Court has stated repeatedly that the Eighth Amendment requires a heightened degree of reliability in capital cases:

[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976). This special degree of reliability is necessary in order to ensure that capital punishment is not imposed in an arbitrary and capricious manner, *Gregg v. Georgia*, 428 U.S. 153, 189 (1976), and to ensure that no one who is innocent or has been unconstitutionally convicted is executed.

Post-conviction remedies, including state habeas corpus proceedings, have become a vital part of the mechanism that ensures the reliability of a capital trial and the proper imposition of the death penalty. As the success rates of capital post-conviction proceedings demonstrate (*supra* at 7-8), capital trials are usually unreliable. Thus, without habeas proceedings, society runs a substantial risk of killing an innocent man. Such a risk cannot survive Eighth Amendment scrutiny. See *Beck v. Alabama*, 447 U.S. 625, 637 (1980) ("[A] risk [of an unwarranted conviction] cannot be tolerated in a case in which the defendant's life is at stake."); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("When the choice is between life and death, that risk [that the death penalty will be imposed in spite of factors which may call for a less severe penalty] is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.").

Indeed, this Court expects — and relies on the fact — that capital cases will receive a complete collateral review. Thus, in Plaintiff Johnny Watkins' own case, Justice Stevens, although acknowledging that there had been a clear constitutional violation, concurred in the denial of Watkins' petition for writ of certiorari on direct appeal in order to "allow the error to be corrected in collateral proceedings." *Watkins v. Virginia*, 475 U.S. 1099, 1100 (1986). Mr. Watkins was unable to begin such proceedings,

however, because he had no lawyer. See also *Sullivan v. Wainwright*, 464 U.S. 109, 112 (1983) (at the post-conviction stage in capital cases, "special care is exercised in judicial review"); *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (in capital post-conviction proceedings, "the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error").

Likewise, in a concurring opinion in *Ford v. Wainwright*, 477 U.S. 399, 420 (1986), Justice Powell concluded that because modern practice includes "ordinarily both state and federal collateral review" and "[t]hroughout this process, the defendant has access to counsel," it is unlikely that an erroneous execution would occur. Unfortunately, contrary to Justice Powell's assumption, death-sentenced prisoners in Virginia do not have access to counsel. If the judgment of the Fourth Circuit were overturned, Justice Powell's "unlikely" scenario will in Virginia become the rule.

Moreover, it is clear that in this day and age, executing an unrepresented man goes beyond the bounds of decency. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."). The reaction of states (other than Virginia) and the federal government to the growing crisis in capital post-conviction representation reveals that a national consensus has developed recognizing that post-conviction proceedings are a vital safeguard to ensuring the reliability of capital trials and that an integral part of this safeguard is the appointment of counsel to represent the death-sentenced inmate. As this Court said in *Gregg v. Georgia*, 428 U.S. 153, 174 n.19 (1976), "legislative measures adopted by the people's chosen representatives provide one important means of ascertaining contemporary values."

The views of "respected professional organizations" also support the conclusion that leaving death-sentenced prisoners unrepresented offends the Eighth Amendment. See *Thompson v. Oklahoma*, 108 S.Ct. 2687, 2696 (1988) (noting the views of the American Bar Association and the American Law Institute on the minimum age for execution). The American Bar Association approved resolutions calling in 1979 for the appointment of counsel for capital post-conviction litigation in state and federal courts and in 1982 for appointment of counsel for prisoners generally. 104

American Bar Association Annual Report 245 (1979); 107 American Bar Association Annual Report 666 (1982). Local bar associations have echoed this view, as reflected in the Amicus Brief filed by the South Carolina Bar Association et al. See also IV ABA Standards for Criminal Justice, Standards 22-3.1(a), 22-4.3 (2d Ed. 1980); Uniform Post-Conviction Procedure Act § 5(a) (1980).

Virginia is thus part of a very small, and ever-shrinking, group of states that is unwilling to guarantee Death Row inmates counsel to assist them in post-conviction proceedings. The provision of counsel to Death Row inmates is, however, no longer just a "good idea"; it is a safeguard our society has come to regard as required by common decency. The Eighth Amendment requires affirmation.

B. Due Process Requires the Appointment of Counsel to Represent Death Row Inmates in State Post-Conviction Proceedings

In *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981), this Court considered the circumstances under which due process, or fundamental fairness, requires appointed counsel. Three elements are to be weighed: (1) the private interest at stake; (2) the governmental interest; and (3) the risk of an erroneous deprivation of liberty if counsel is not provided.

The private interest involved here is life and the avoidance of an erroneous loss of that life. As the Court wrote in *Ake v. Oklahoma*, 470 U.S. 68, 78 (1985), in considering whether fundamental fairness required the appointment of expert witnesses in capital cases, "[t]he private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling."

To a very significant degree, the governmental interest overlaps that of the individual. "The State, too, has a profound interest in assuring that its ultimate sanction is not erroneously imposed. . . ." *Ake*, 470 U.S. at 83-84. Petitioners themselves have acknowledged that their interest is identical to that of individual Death Row inmates: They prefer that the inmate have counsel in state post-conviction proceedings and that new counsel be ap-

pointed at that stage. (J.A. 272) See also 847 F.2d at 1122 and 668 F. Supp. at 515 (both noting the convergence of the individual's and society's interests).¹⁶

The risk that there will be erroneous decisions -- and thus erroneous executions -- is substantial in the absence of counsel. As the district court found, a failure to provide counsel in effect forecloses access to post-conviction review because a Death Row inmate is incapable of proceeding *pro se*. And, the Death Row inmate is then deprived of a better than even chance of receiving a new trial.

Finally, the Court noted that these interests must in turn be weighed against "the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." 452 U.S. at 26-27. If the prisoner loses in habeas proceedings (which have become an integral part of the judicial review process in capital cases), he will suffer the ultimate loss of physical liberty -- death.

In this case, when (1) the proceedings involved will be the final determination whether the inmate lives or dies, (2) the individual interest is in an avoidance of an erroneous loss of life, (3) any adverse interest of the State is minor, and (4) the risk of error is intolerably high, due process requires the appointment of counsel. *Id.* at 31. As Chief Justice Burger wrote: "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater

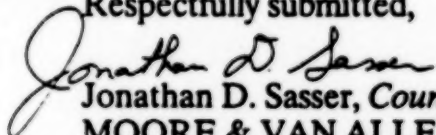
¹⁶ The only adverse interests identified by Petitioners are finality and the desire that the inmate not select his own lawyer. (Br. at 16, 29) The latter concern is readily eliminated if the state provides counsel rather than forcing inmates to find volunteers. In any event, if a lawyer is willing to represent a Death Row inmate, is qualified, and otherwise unobjectionable, what legitimate reason can the Virginia Attorney General have for opposing his or her appointment? Finality is better served by the appointment of counsel. (*Supra* at pp. 43-45) Petitioners have not argued that providing counsel would impose too great a financial burden on the State. In any event, since numerous other states and the federal government make counsel available, any argument of financial burden would be unpersuasive. *Ake*, 470 U.S. at 78.

than any possible harm to the state." *Addington v. Texas*, 441 U.S. 418, 427 (1979).¹⁷

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the decision below be affirmed.

Respectfully submitted,


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¹⁷ A failure to provide counsel for collateral review also violates the Sixth Amendment by interfering with an individual's ability in post-conviction proceedings to enforce his right to effective assistance of counsel at trial and on appeal. See *Kimmelman*, 477 U.S. at 378. Moreover, because of the exhaustion requirement and the deference given in federal court to state proceedings, a failure to provide counsel at the state level – resulting in either a complete failure to pursue state relief or extensive procedural bars – will effectively preclude an inmate from seeking relief through a federal petition for habeas corpus, thereby suspending the writ in violation of Article I of the Constitution. Finally, since an indigent condemned man cannot pursue post-conviction relief without the assistance of counsel and since a failure to pursue such relief will lead to an immediate execution cutting off the opportunity for such relief – even though many of the inmate's claims may never have been heard by any court – a failure to provide counsel to pursue remedies that other inmates may pursue denies equal protection.

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Supreme Court, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EDWARD W. MURRAY, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS, et al.,
Petitioners,

v.

JOSEPH M. GIARRATANO, et. al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This case involves a single question of law: does the Constitution require states to provide personal lawyers to represent inmates who desire to challenge death sentences in state post-conviction proceedings?

All death row inmates in Virginia have been represented by counsel in their state habeas corpus proceedings, whether by volunteer or court-appointed attorneys. Not one of the seven inmates executed in Virginia since this Court's decision in *Furman v. Georgia* was without counsel for a state post-conviction proceeding. All death row inmates have counsel now.

As the plaintiffs acknowledge (Respondents' Brief at 45), Virginia does not oppose inmates having attorneys in state habeas corpus actions. (J.A. 272). The Attorney General's Office joins in motions for stays of execution to permit the attorneys to prepare and amend petitions and will join in motions for appointment of counsel filed by unrepresented inmates. (J.A. 271-72, 273, 278).

However, the inmates' preference for representation by particular counsel in such proceedings and the State's willingness to make representation by counsel available does not confer a right to counsel or define the state's constitutional obligation. Requiring appointment of counsel prior to the filing of a post-conviction action is unnecessary and unwise both because the totality of the procedures presently afforded those accused and convicted of capital offenses meets the requirements of fundamental fair-

ness and because intolerable consequences will follow the declaration of such a right. The prisoners offer nothing to support a constitutional basis for the obligation they intend to impose on Virginia, and suggest no means to limit such a broad right.

I. THE RIGHT OF MEANINGFUL ACCESS TO THE COURTS DOES NOT INCLUDE A RIGHT TO STATE—SUPPLIED PERSONAL LAWYERS.

In *Bounds v. Smith*, this Court held that states must provide prisoners with a source of legal information to assure a “reasonably adequate opportunity to present claimed violations of fundamental constitutional rights.” 430 U.S. 817, 825 (1977). This obligation is met by providing law libraries *or* the assistance of “persons trained in the law.” *Id.* at 828.

Bounds encourages flexibility in a state’s response to its obligation of providing access to the courts. 430 U.S. at 830-32. Virginia has chosen to make legal assistance and information available to inmates through *both* methods approved by this Court in *Bounds*. Virginia provides adequate law libraries *and* makes attorneys available to provide legal assistance. Virginia thus already exceeds the requirements of the right of access identified in *Bounds*. The courts below ignored the clear meaning of *Bounds v. Smith* and instead transformed the limited right articulated in that case into a right to personal legal counsel.

Other federal courts have consistently refused to find a right to counsel in the right of access. *See Mann v. Smith*, 796 F.2d 79, 84 (5th Cir. 1986) (“*Bounds* cannot have meant to require legal assistance equivalent to the provision of a lawyer.”); *Carter v. Fair*, 786 F.2d 433, 435 (1st Cir. 1986) (“Prison facilities are not required to provide comprehensive legal representation for inmates.”); *Hooks v. Wainwright*, 775 F.2d 1433, 1436 (11th Cir. 1985) (“It presses credulity to contend that the Supreme Court intended there would be a constitutional right to legal counsel if it were found that some prisoners were illiterate and that nonlawyer prisoners could not use the libraries as well as lawyers.”); *Corgain v. Miller*, 708 F.2d 1241, 1250 (7th Cir. 1983) (“Actual attorney-client representation is not necessary to remedy the library deficiencies.”).

The plaintiffs refer to several court-ordered programs of assistance from paralegals or other “persons trained in the law” to supplement particular identified inadequacies in a state’s law library plan. (Respondents’ Brief at 27-28, nn. 6 & 7). The difference between legal assistance, as described in *Bounds*, 430 U.S. at 830-32, and representation by personal

counsel was ignored below, even though it is dispositive of this case. *No* court before now has ever applied *Bounds* to find a right to personal counsel.

II. A CONSTITUTIONAL RIGHT TO POST-CONVICTION COUNSEL IS AN UNWARRANTED INTRUSION INTO STATE PROCEEDINGS.

The creation of a federal constitutional right to counsel for state post-conviction proceedings eliminates the longstanding flexibility allowed states in the conduct of their post-conviction proceedings. The courts below embrace the position in this case that the Constitution dictates the precise form in which states must provide legal assistance to inmates in proceedings which are wholly the product of state law. This Court, however, explicitly rejected that premise in *Pennsylvania v. Finley*:

On the contrary, in this area states have substantial discretion to develop and implement programs to aid prisoners seeking to secure post-conviction review.

107 S.Ct. 1990, 1995 (1987).

This flexibility is reflected in the varying methods of providing counsel for inmates in state post-conviction proceedings. Several states have chosen to provide for representation of inmates in post-conviction proceedings. *See, e.g.*, Fla. Stat. Ann. §§ 27.7001 et seq. (West 1988); Md. Ann. Code Art. 27 § 645A. Others have determined that counsel should be available after a petition is filed or if a hearing is required. *See* Ariz. Rule of Crim. Proc. 32.5(b); Mo. Rules of Criminal Procedure 24.035(e) and 29.15(e); N.C. Gen. Stat. § 7A-451(a)(2). Other states have chosen, as has Virginia, to permit discretionary appointment of counsel in post-conviction proceedings. *See* Nev. Rev. Stat. 34.750. The plaintiffs’ evidence at trial indicated that two-thirds of the states with capital punishment statutes do not automatically provide for counsel to represent prisoners in their post-conviction efforts. (J.A. 72-73).

The plaintiffs urge this Court to substitute a rigid right to “the continuous services of an attorney to investigate, research and present claimed violations of fundamental rights.” 668 F.Supp. at 514 (Pet. App. A-28), for the flexible approaches previously chosen by the states. Such a right will almost certainly bring with it never-ending collateral litigation.

A state-granted right to counsel for a state post-conviction proceeding, as in *Finley*, presents no federal issue concerning the adequacy of

that attorney's performance. The state courts remain free to determine how that right is satisfied. *Finley*, 107 S.Ct. at 1995. A constitutional right to counsel, however, implies a corresponding right to challenge the effectiveness of counsel and attack the validity of the proceedings involved.

Shortly after the district court's decision in this case, a Virginia death row inmate filed a last-minute petition challenging the effectiveness of his court-appointed habeas counsel. A panel of the Fourth Circuit applied this Court's decision in *Pennsylvania v. Finley* and rejected the claim. *Whitley v. Muncy*, 823 F.2d 55 (4th Cir. 1987). In the present case, however, the Fourth Circuit *en banc* majority held that *Finley* does not preclude recognition of a constitutional right to counsel in state habeas corpus proceedings involving a death sentence. Thus, the validity of state capital habeas corpus proceedings will again be subjected to challenge on wholly collateral matters as unsuccessful inmates assert their dissatisfaction with previous habeas counsel as a basis to avoid or overturn the results of prior collateral attacks. The decisions below present the very real prospect of institutionalizing infinite collateral litigation.

III. A DEATH SENTENCE DOES NOT WARRANT A NEW CONSTITUTIONAL RIGHT TO COUNSEL FOR STATE HABEAS CORPUS PROCEEDINGS.

The seriousness of the death sentence requires that the decision to impose that penalty be made with scrupulous fairness following a process that narrowly focuses the charging, trial and sentencing decisions to provide assurance that the punishment is appropriately determined. (Brief for Petitioners at 18-20). Once the sentence is imposed and upheld pursuant to this most careful process, it is entitled to the same presumption of legality and finality recognized for all criminal convictions.

The Constitution does not confer a special right to counsel for this class of inmates solely because they seek to challenge death sentences. It is the fundamentally distinct nature of post-conviction review that is incompatible with the requirement of a right to counsel. *Finley*, 107 S.Ct. at 1994. The plaintiffs ignore the basic purpose of habeas corpus proceedings, and disregard the rulings of this Court concerning the singular importance of the criminal adjudication process itself, see *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977), and the essential interest in the finality of criminal judgments. See *Engle v. Isaac*, 456 U.S. 107, 127 (1982).

The trial and appellate protections afforded the defendant in every

capital case in Virginia, all further secured by a right to effective assistance of counsel during these stages of the proceedings, provide full assurance that the result is the product of the fairest system of adjudication that can be conceived. Once direct proceedings are concluded, however, nothing in the Constitution requires that Virginia, or any other state, provide a right to counsel for collateral attacks on a death sentence.

IV. VIRGINIA INMATES ARE PROVIDED MEANINGFUL ACCESS TO THE COURTS.

Given the absence of a constitutional basis, the decisions below cannot be justified by the district court's "findings of fact." The district court's interpretation of Virginia law, and its definition of the right of access to the courts, are not findings of fact. These are manifestly matters of law.

The district court erred at step one. By measuring the means of obtaining legal information and assistance against the benefits of a personal lawyer, the court below made conclusions as to the adequacy of Virginia's assistance under an incorrect legal standard. Even while accepting the district court's "findings", the Fourth Circuit majority treated this issue as a matter of law independent of any facts:

Because of the peculiar nature of the death penalty, we find it difficult to envision any situation in which appointed counsel would not be required in state post-conviction proceedings when a prisoner under a sentence of death could not afford an attorney.

847 F.2d at 1122 n.8. (Pet. App. A-7-8). As a matter of law, however, the courts below misinterpreted the state's constitutional obligation to provide meaningful access to the courts.

The legal resources currently available to inmates in Virginia assure that all inmates have a reasonable opportunity to fairly present their claims in state and federal courts. No findings of fact of the district court in this case suggests that the Virginia system is inadequate under the long-settled interpretation of the right of access to the courts. As the district court acknowledged, Virginia's choice of methods for meeting its access obligation has been upheld consistently by that court and the Fourth Circuit. 668 F. Supp. at 514. (Pet. App. A-27).

An inmate may, under existing Virginia law, ask a state court to appoint counsel to represent him in a state habeas corpus action. The record establishes that Virginia courts have exercised that authority to appoint counsel whenever asked by an unrepresented death row inmate.

(J.A. 325, 328, 353). If an inmate needs assistance in making such a request, the institutional attorney may assist him. (J.A. 222, Tr. 335). The Virginia Attorney General's Office will join in such motions made by unrepresented death row inmates. (J.A. 272-73, 278).

An inmate may prepare a habeas corpus petition himself, or with the assistance of the institutional attorneys. The law libraries and the institutional attorneys are available for inmates who want legal information and assistance to prepare such petitions. (J.A. 302-305, 331-35, 340, 344-45). The institutional attorneys have prepared habeas corpus petitions for inmates who have requested such assistance. (J.A. 218-20, 234-35). No death row inmate has ever asked an institutional attorney to prepare a habeas corpus petition. (J.A. 224, 230).

Inmates are not limited only to those claims filed in the initial pleadings presented to the state habeas corpus court. Whether the inmate proceeds *pro se* or with counsel, amendments to habeas corpus petitions are liberally granted, in Virginia as in the federal courts. Rule 1:8, *Rules of the Virginia Supreme Court*. The institutional attorneys are available to help with amendments and responses to pleadings submitted on behalf of the Commonwealth. (J.A. 220). The state courts routinely allow amendments. (J.A. 105).

When a hearing is held on a petition for a writ of habeas corpus, counsel is appointed by the state court. This has long been the rule in Virginia for all habeas corpus actions. *Darnell v. Peyton*, 208 Va. 675, 160 S.E.2d 749 (1968). Appointed counsel is also available for an appeal of the habeas corpus action. *Cooper v. Haas*, 210 Va. 279, 170 S.E.2d 5 (1969).

Legal information and assistance is not limited to the inmates' state court efforts, but is available for federal court actions as well. In federal court, inmates challenging a death sentence will also be entitled to seek the appointment of counsel under the recently enacted Anti-Drug Abuse Bill of 1988. Public L. No. 100-690, 102 Stat. 4181 (1988).

The variety of sources of legal information and assistance made available to Virginia's death row inmates assures that they will continue to have the opportunity to identify, develop, and present their claims to the appropriate courts, and have a fair adjudication of their claims. There is no evidence that Virginia's chosen method of providing access has ever failed.

V. THE ALTERNATE GROUNDS OFFERED BY THE PLAINTIFFS CANNOT SUPPORT THE DECISIONS BELOW.

Recognizing the lack of merit in their theory of access to the courts, the plaintiffs have resurrected the alternate bases for a right to post-conviction counsel originally advanced in the district court. They now ask this Court to affirm the judgments below under the Eighth Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Sixth Amendment, and the Suspension Clause of Article I. These constitutional theories were not addressed in any fashion by the courts below. Plaintiffs' arguments evade the issue that this Court granted certiorari to review.

These theories are properly rejected for a common reason: lack of merit. The Eighth Amendment concerns identified by this Court have led to heightened procedural requirements for capital trials and sentencing proceedings. See *Zant v. Stephens*, 462 U.S. 862, 876-77 (1983). The plaintiffs do not dispute that Virginia law meets or exceeds all the requirements of the Constitution for the imposition of a death sentence. (See Brief for Petitioners, at 12-13). This Court has specifically rejected the argument that a due process or equal protection right to counsel exists for state post-conviction proceedings. *Pennsylvania v. Finley*, 107 S.Ct. at 1993-94. The Sixth Amendment right to counsel, by its own terms, applies only in criminal prosecutions. The suspension clause of Article I, although clearly not implicated here, restricts actions of the federal government, not the states. See *Gasquet v. LaPeyre*, 242 U.S. 367, 369 (1917). States have no constitutional obligation to provide post-conviction relief. *Finley*, 107 S.Ct. at 1995.

CONCLUSION

The Constitution does not require states to provide personal attorneys to represent inmates seeking to challenge death sentences in state post-conviction actions. Accordingly, the decision below requiring Virginia to do so should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

EDWARD W. MURRAY, DIRECTOR;
VIRGINIA DEPARTMENT OF CORRECTIONS, *et al.*,

Petitioners,

—v.—

JOSEPH M. GIARRATANO, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE AND BRIEF *AMICUS CURIAE*
OF THE AMERICAN CIVIL LIBERTIES UNION
AND ITS NATIONAL PRISON PROJECT
IN SUPPORT OF RESPONDENTS**

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MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE OF THE AMERICAN CIVIL LIBERTIES
UNION AND ITS NATIONAL PRISON PROJECT

=====

The American Civil Liberties Union and
its National Prison Project hereby move for
leave to file the attached brief amicus
curiae pursuant to Rule 36.3 of the Rules

of this Court. The reason for this motion is that counsel for petitioners has refused to consent to the filing of an amicus curiae brief by the ACLU.

The ACLU is a nationwide, non-partisan, membership organization dedicated to defending the principles embodied in the Bill of Rights. It has participated in hundreds of cases before this Court, either as counsel for one of the litigants or as amicus curiae.

Through the work of its National Prison Project, the ACLU has developed a unique expertise on prison conditions throughout the country. That expertise is particularly relevant to the issue now before the Court -- namely, the indispensability of appointed counsel in enabling Death Row inmates to obtain meaningful access to the courts.

Accordingly, we respectfully move for leave to file the attached brief amicus curiae in the hope of assisting the Court in resolving the important constitutional questions presented by this case.

Respectfully submitted,

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Dated: January 13, 1989

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INTEREST OF AMICI

The interests of amici are set forth in the motion attached to this brief.

STATEMENT OF THE CASE

Amici adopt the factual summary set forth in respondents' brief. In addition, we note the following facts regarding capital post-conviction proceedings in Virginia.

The Virginia Supreme Court applies a strict contemporaneous objection rule in reviewing capital murder convictions and death sentences. See Virginia Supreme Court Rule 5:25. Under this rule, a failure by trial counsel to object, to provide reasons for any objection, or to request a particular form of relief, irrevocably waives the point not raised below. (J.A. 89-90). On the basis of this rule, the

Virginia Supreme Court has recently refused to consider alleged errors that two Death Row inmates attempted to raise on direct appeal. Wise v. Commonwealth, 230 Va. 322, 377 S.E.2d 715 (1985), cert. denied, 475 U.S. 1112 (1986); Watkins v. Commonwealth, 229 Va. 469, 331 S.E.2d 422 (1985), cert. denied, 475 U.S. 1099 (1986). Thus, on the one appeal to the Virginia Supreme Court for which the Commonwealth supplies appointed counsel, an indigent person convicted of a capital crime may not be able to raise critical constitutional issues relating to his or her conviction or sentence.

The Virginia Supreme Court also does not review the entire record on direct appeal for errors in capital murder cases. Instead, the Virginia Supreme Court reviews only those questions assigned as error by

the parties, and the additional questions of whether a sentence of death was imposed under the influence of passion, prejudice, or other arbitrary factors, and whether the sentence is excessive or disproportionate to the penalty imposed in similar cases.

- Va. Code §17-110.1(C).

Issues precluded from consideration by the Virginia Supreme Court, either because of the contemporaneous objection rule or because they were not assigned as error, can be raised in state post-conviction proceedings if counsel was ineffective in failing to object or to assert the claim. See Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680, 682 (1974), cert. denied, 419 U.S. 1108 (1975). To avoid the consequences of waiver, however, the litigant must be prepared to make a persuasive showing that review of his or her claims in

post-conviction proceedings is appropriate. (J.A. 90-91, 150-151).

Until 1985, claims of ineffective assistance of trial counsel could not be raised at all on direct appeal as a matter of Virginia law, and thus were always raised only in post-conviction proceedings. (J.A. 87-88). The severity of this rule was to some extent modified in 1985 with the enactment of Va. Code §19.2-317.1, which provides that claims of ineffective assistance of counsel based on matters fully contained in the record may be raised on direct appeal. In most instances, however, the ineffective assistance of counsel will not be apparent from the record alone. (J.A. 88). As of the time this case was tried, there had been only one capital appeal in which the Virginia Supreme Court addressed a claim of ineffec-

tive assistance of counsel raised under §19.2-317.1. In that case, the Virginia Supreme Court ruled that the ineffective assistance claims could not be resolved on direct appeal based on the trial record:

[W]e will not rule as a matter of law, upon this record, that counsel's conduct was consistent with reasonable trial strategy and therefore was not ineffective. We will not impute to counsel a certain rationale and thereby deny the defendant the opportunity to demonstrate, by evidence which might be obtained in a plenary hearing, that counsel had no such tactical basis for his actions.

Frye v. Commonwealth, 231 Va. 270, 345 S.E.2d 267, 288 (Va. 1986). The Death Row inmate in Frye was therefore required to raise his claim of ineffective assistance of counsel in post-conviction proceedings -- precisely the proceedings in which the state refuses to provide counsel. (J.A. 165, 276-277, 287-288).

As a practical matter, the issue of ineffective assistance of counsel will almost always be litigated in habeas corpus proceedings rather than on direct appeal. In Virginia, as in most states, the attorney appointed for trial is usually the same attorney who prosecutes the direct appeal. (J.A. 276-277). That attorney is unlikely to challenge his or her own effectiveness at the prior trial. Nor is there adequate time to investigate completely claims of ineffective assistance of counsel in the time allotted for direct appeal. (J.A. 88-89) Claims of ineffective assistance of appellate counsel, of course, can only be raised in habeas corpus proceedings.

Finally, Virginia law severely restricts a pro se inmate's ability to file a second habeas petition in order to raise

legal issues that may have been omitted inadvertently from the first petition. Rather, "all claims, the facts of which are known at the time of filing, must be included in [the initial] petition as they may not be raised successfully in a subsequent filing and those claims also could not be considered in federal court because federal courts generally may not consider claims barred by Virginia procedural rules." Giarratano v. Murray, 847 F.2d 1118, 1120 n.4 (4th Cir. 1987) (en banc), citing Whitley v. Bair, 802 F.2d 1487 (4th Cir. 1986), cert. denied, 107 S.Ct. 1618 (1987).

SUMMARY OF ARGUMENT

The right to be represented by counsel at the trial and appellate stages of a criminal prosecution has been recognized by

this Court as a fundamental right for over a quarter of a century. This recognition reflects the fact that it is through counsel that all other rights of the accused are protected. The need for vigorous advocacy is no less crucial in post-conviction proceedings involving the death penalty. Indeed, the risk of error engendered by the absence of counsel in collateral challenges is unique in death cases and is inconsistent with the reliability this Court has demanded in capital cases. For that reason, Congress has recently recognized the importance of counsel in collateral proceedings for death-sentenced prisoners.

Even if this Court does not extend the right to counsel to all capital cases at the post-conviction stage, the right should attach to Virginia's post-conviction pro-

ceedings because in certain important respects they operate as a substitute for appeal. By virtue of Virginia state court procedure, certain constitutional claims cannot be resolved on direct appeal but must be litigated in state court collateral proceedings. On those issues, collateral review is the only review possible and the constitutional right of counsel therefore attaches for indigent defendants.

Finally, the trial court and the en banc court of appeals correctly weighed the special needs of Death Row prisoners in holding that this Court's decision in Bounds v. Smith, 430 U.S. 817 (1977), requires the appointment of counsel in state post-conviction proceedings in order to assure meaningful access to the courts.

ARGUMENT

I. THE RATIONALE OF GIDEON v. WAINWRIGHT AND DOUGLAS v. CALIFORNIA REQUIRES COUNSEL IN STATE POST-CONVICTION PROCEEDINGS FOR DEATH-SENTENCED INMATES

The Sixth Amendment right to be represented at trial by counsel is a fundamental right of criminal defendants; it assures the fairness and legitimacy of our adversary process. Gideon v. Wainwright, 372 U.S. 335, 344 (1963). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862 (1975).

In a criminal proceeding, the defendant's liberty, and perhaps life, depend on the ability to confront "the intricacies of the law and the advocacy of the public prosecutor," United States v. Ash, 413 U.S.

300, 309 (1973). Absent representation, however, it is unlikely that a criminal defendant will be able to test the government's case adequately for, as Justice Sutherland wrote in Powell v. Alabama, 287 U.S. 45 (1932), "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law." Id. at 69. Thus, a criminal trial is not conducted in accord with due process of law unless the defendant has counsel. Gideon, 372 U.S. at 345; cf. Perry v. Leeke, No. 87-6325 (January 10, 1988), slip op. at 6.

The commitment to the adversary process is no less crucial on appeal of a criminal conviction than it is at the trial stage. Accordingly, this Court has held that the Fourteenth Amendment guarantees a criminal appellant pursuing a first appeal as of right certain minimum safeguards

necessary to make that appeal "adequate and effective." See Griffin v. Illinois, 351 U.S. 12, 20 (1956). These safeguards include the right to counsel. Douglas v. California, 372 U.S. 353 (1963). Earlier this Term, the Court reaffirmed Douglas and commented at length on the necessity of counsel in appellate proceedings, as follows:

The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage. Both stages of the prosecution, although perhaps involving unique legal skills, require careful advocacy to ensure that rights are not foregone and that substantial legal and factual arguments are not inadvertently passed over. As we stated in Evitts v. Lucey, 469 U.S. 387 (1985):

"In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. To

prosecute the appeal, a criminal appellant must face an adversary proceeding that -- like a trial -- is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant -- like an unrepresented defendant at trial -- is unable to protect the vital interests at stake." Id., at 396.

Penson v. Ohio, 109 S.Ct. 346, 352 (1988).

The most compelling argument for extending Gideon and Douglas to state post-conviction proceedings in capital cases is the risk of an erroneous execution.

Lockett v. Ohio, 438 U.S. 586, 605 (1978).

Any such risk is intolerable when the appointment of counsel would so clearly enhance the reliability of the conviction and sentence. See Ake v. Oklahoma, 470 U.S. 68, 77 (1985) (weighing the probable value of procedural safeguards against the risk of an erroneous deprivation of life

if those safeguards are not provided); Beck v. Alabama, 447 U.S. 625, 637-638, 643 (1980) (assessing risk of erroneous conviction relative to enhanced reliability resulting from additional procedural safeguards).^{1/}

Indeed, the insistence on rigorous fact-finding procedures and a fair adversary process has been a consistent theme of this Court's death penalty jurisprudence. "This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." Ford v. Wainwright, 477 U.S. 399, 411 (1986).^{2/}

^{1/} The weighing of risks undertaken by the Court in Ake and Beck is consistent with this Court's traditional due process analysis. See e.g., Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

^{2/} See also Johnson v. Mississippi, 108 S.Ct. 1981, 1986 (1988); Maynard v. Cartwright, 108 S.Ct. 1853, 1858 (1988).

The same point was made in slightly different terms in Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

The penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.

Thus, long before this Court established the right to counsel in all felony cases, Gideon v. Wainwright, supra, it recognized that right in capital cases. Powell v. Alabama, 287 U.S. 45, 71-72 (1932). Likewise, this Court has often required special procedures to ensure the reliability of capital verdicts, both at trial^{3/} and in post-conviction proceedings.^{4/}

^{3/} E.g., Ake v. Oklahoma, supra.

^{4/} E.g., Ford v. Wainwright, supra.

For similar reasons, the ineffective assistance of counsel is especially devastating in capital cases. For most defendants, moreover, collateral review is the only available avenue for raising a claim of inadequate representation. As the Court stated in Kimmelman v. Morrison, 477 U.S. 365, 378 (1986) (citations omitted):

A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance, cf. Powell v. Alabama, supra; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case. Indeed, an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings, particularly if he retained trial counsel on direct appeal.

Although Kimmelman did not involve a claimed right to counsel in post-conviction proceedings, the Court's discussion in

Kimmelman has direct application to the case at bar. Collateral review is an empty promise for indigent defendants who may have suffered from inadequate representation at trial or on direct appeal but who cannot afford to "consult[] another lawyer." Id. Without appointed counsel, a defendant in these circumstances is left at sea in pursuing a claim that may call into question the fairness of the conviction yet was never addressed by either the trial or appellate courts.

It is particularly anomalous to deny counsel in state post-conviction proceedings now that Congress has determined that counsel is required in all federal habeas cases involving the death penalty, including those brought by state prisoners under 28 U.S.C. §2254. See Pub. L. No. 100-690, §7001, 102 Stat. 4181 (1988). If petition-

ers prevail here, the provision of counsel in §2254 proceedings will be largely meaningless for death-sentenced prisoners challenging their state convictions because many constitutional claims will have been waived in uncounseled state post-conviction proceedings. For Virginia prisoners, in particular, the issues raised in the petition for collateral relief in state court shape the issues that the prisoner can raise in any subsequent state or federal collateral challenges. See Whitley v. Bair, 802 F.2d 1487 (4th Cir. 1986), cert. denied, 107 S.Ct. 1618 (1987).^{5/}

In the past, this Court has looked to evolving standards of decency in determining whether a particular punishment comports with the fundamental human dignity

^{5/} See also Va. Code §801-654(B)(2).

required by the Eighth Amendment. Ford v. Wainwright, 477 U.S. at 406; Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion). The congressional action providing counsel in all federal habeas proceedings involving the death penalty is strong evidence that contemporary values and evolving standards of decency require that capital punishment not be imposed without the provision of counsel at all stages of review.

This Court is well aware of the significant number of cases in which condemned prisoners have succeeded in having either their convictions or sentences vacated in post-conviction collateral proceedings. See Barefoot v. Estelle, 463 U.S. 880, 915 (1983) (Marshall, J., dissenting) (observing that between 1976 and 1983, approximately 70% of all Death Row inmates who took their

cases to the federal courts of appeals obtained a reversal of their convictions or sentences). To consign the responsibility for discovering error in a case in which the stakes are so high to those who are unschooled in the vagaries of death penalty law^{6/} -- and not infrequently functionally illiterate^{7/} -- directly ignores the logic

^{6/} Because of the complexity of many capital cases, the new congressional statute establishes experience standards for attorneys representing capital defendants in federal court. Trial attorneys must have at least five years' experience practicing as a member of the local bar and at least three years' experience trying felony prosecutions in the appointing court. Attorneys appointed after trial must have been admitted to practice before the court of appeals for not less than five years, and must have had at least three years' experience handling felony appeals in appointing court. Pub. L. No. 100-690, §7001, 102 Stat. 4181.

^{7/} At the end of 1987, 22.5% of those prisoners on Death Row nationwide had completed the eighth grade or less, and another 36.7 percent had not completed high school. Capital Punishment 1987, Bureau of Justice Statistics, U.S. Department of Justice. According to the Director of Correctional Statistics for the Bureau, 24 of 57 prisoners

(continued...)

of Gideon and Douglas, as well as Powell v. Alabama.^{8/}

We recognize that this Court's decisions in Ross v. Moffit, 417 U.S. 600 (1974), and Pennsylvania v. Finley, 107 S.Ct. 1990 (1987), reject the argument that the appointment of counsel is required in all state collateral proceedings. Neither Ross nor Finley, however, involved the

^{7/} (...continued)
confined in a Virginia death row for this same period had a ninth grade education or less. (Telephone conversation of January 3, 1989, between Lawrence Greenfeld, Director of Correctional Statistics for the Bureau of Justice Statistics, and Mark J. Lopez, on the Brief for Amici).

^{8/} The problem is compounded because, as the district court found, even if Death Row inmates have the intellectual capability to pursue their own claims, they are by and large too emotionally debilitated by the stresses of impending death to prosecute their claims effectively. Giarratano v. Murray, 668 F.Supp. 511, 513 (E.D.Va. 1986). See Strafer, Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention, 74 Journal of Criminal Law and Criminology, 867-869 (1983).

death penalty. For the reasons given above, their holdings should not be extended to this case.^{9/}

II. WHERE STATE POST-CONVICTION PROCEEDINGS IN CAPITAL CASES ARE A SUBSTITUTE FOR APPEAL, THE FOURTEENTH AMENDMENT REQUIRES APPOINTMENT OF COUNSEL

As noted in our statement of the case, Virginia law effectively bars claims of

^{9/} For the reasons given in respondents' brief, affirmance of the lower court will not raise the specter of additional litigation of constitutional claims. But even if affirmance would generate some costs in reducing the finality of certain judgments, these costs would be outweighed by the constitutional interests involved. In Kimmelman, the Court was confronted with a similar argument that its holding in Stone v. Powell, 428 U.S. 465 (1976), would be eviscerated by allowing prisoners to raise Fourth Amendment claims in the context of a Sixth Amendment claim of ineffective assistance of counsel. The Court unanimously held (with three Justices concurring), that the costs associated with allowing the claims to proceed could not justify the risk of constitutionally deficient assistance of counsel. As the Court observed in Kimmelman: "The Sixth Amendment mandates that the state bear the risk of constitutionally deficient assistance of counsel." 477 U.S. at 379.

ineffective assistance of counsel on direct appeal when the basis for the claim cannot be fully determined within the contours of the trial record. See Frye v. Commonwealth, supra. Accordingly, the first opportunity for a prisoner awaiting execution to have this constitutional claim reviewed in Virginia occurs when the prisoner is able to file a state court collateral attack on the conviction and sentence.

Because Virginia state court procedure defers resolution of this critical constitutional issue to its collateral proceedings, those collateral proceedings are critical to the integrity of the process by which Virginia imposes the death sentence. Having chosen to make its collateral proceedings a substitute for direct appeal in this vital respect, Virginia must also

assume the obligation of providing indigent defendants with appointed counsel under Douglas v. California and Penson v. Ohio.

The constitutional basis for that obligation was recently explained by this Court:

Due Process emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. Equal Protection, on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable. In cases like Griffin and Douglas, due process concerns were involved because the States involved had set up a system of appeals as of right but had refused to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal. Equal protection concerns were involved because the State treated a class of defendants -- indigent ones -- differently for purposes of offering them a meaningful appeal.

Evitts v. Lucey, 469 U.S. 387, 405 (1985)

(footnote omitted). Both due process and

equal protection concerns are implicated in this case.

A. Due Process

Once a state has created an appeal as of right, a criminal defendant is constitutionally entitled to the effective assistance of counsel on that appeal. In Evitts, this Court specifically rejected the state's argument that "whatever a state does or does not do on appeal -- whether or not to have an appeal and if so, how to operate it -- is of no due process concern to the Constitution" Id. at 400. Rather, this Court held in Evitts that once Kentucky had established an appeal as of right, the Due Process Clause controlled the manner in which the right could be curtailed. Id. at 400-401. The state also argued in Evitts that it did not provide an appeal as of right but only an appeal

conditioned on compliance with state procedural rules. This Court disagreed, noting that the defendant did not otherwise have "an adequate opportunity to present his claims fairly in the context of the State's appellate process." Id. at 402, quoting Ross v. Moffit, 417 U.S. at 616 (1974).

Just as Kentucky could not recharacterize its right of appeal to deny meaningful review in Evitts, Virginia should not be able to deny meaningful review here simply because as a matter of its own criminal procedure such review takes place in a collateral proceeding rather than on a direct appeal. The essential fact is that, under Virginia law, collateral review offers the first opportunity for most

criminal defendants to present their claim of inadequate assistance of counsel.^{10/}

Surely, if full review of the competency of counsel were available in the Virginia Supreme Court, failure to raise counsel's competency in appropriate circumstances would itself give rise to a claim of inadequate representation under Evitts. It elevates form over substance to argue that there is no right to counsel at all when state procedure allocates review of the competency of counsel to collateral proceedings.^{11/} We therefore urge this

^{10/} See e.g., Penson v. Ohio, supra, holding that the appellate court could not decide the merits of a non-frivolous claim without appointing counsel even though an Anders brief had been filed.

^{11/} Pennsylvania v. Finley, 107 S.Ct. 1990 (1987), does not bar relief here. While this Court said in Finley that "the right to appointed counsel extends to the first appeal of right, and no further," id. at 1993, the Court assumed an appeal of right in which all existing claims could be raised and resolved. Because this assumption does not apply
(continued...)

Court to hold that because Virginia law has created a right to appeal that is functionally divided between direct and collateral proceedings, the right to appointed counsel can and must apply in both proceedings.

B. Equal Protection

Appeal to the Virginia Supreme Court from the trial court is the only direct appeal available within the Virginia state system of criminal appeals. Accordingly, Virginia could not deny to any convicted indigent, let alone an indigent prisoner sentenced to death, an automatic right to counsel to pursue an appeal in the Virginia Supreme Court. Douglas v. California, 372 U.S. 353 (1963).

11/ (...continued)
in this case, Finley does not govern resolution of the issue.

The indigent prisoner sentenced to death in Virginia who must take his or her ineffective assistance claim to a Virginia trial court on collateral review, rather than to the Virginia Supreme Court on an appeal as of right, is in the same position as the California indigent defendant in Douglas. As this Court noted in Douglas,

In California . . . once the court has "gone through" the record and denied counsel, the indigent has no recourse but to prosecute his appeal on his own, as best he can, no matter how meritorious his case may turn out to be. The present case, where counsel was denied petitioners on appeal, shows that the discrimination is not between "possibly good and obviously bad cases," but between cases where the rich man now can require the court to listen to argument of counsel before deciding the merits, but a poor man cannot. There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit,

is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.

Id. at 357-358.^{12/}

The distinction between rich and poor defendants also violates the principle of Evitts v. Lucey, supra. As argued previously, Evitts establishes that a state cannot provide an appeal as of right and then deprive the appeal of meaning in particular cases. Yet that is precisely

^{12/} This Court's decision in Ross v. Moffit, 417 U.S. 600 (1974), is readily distinguishable. In Ross, this Court held that an indigent defendant was not entitled to the appointment of counsel in a discretionary appeal. Unlike Douglas, the claims of the indigent defendant in Ross had been presented by a lawyer and passed upon by an appellate court. 417 U.S. at 614-615. The state thus met its obligation "to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." Id. at 616. By contrast, indigent prisoners are not given an opportunity to present critical claims of constitutional error with the assistance of counsel in the particular context of the Virginia appellate process.

what Virginia has done through its procedural rules. An indigent defendant sentenced to death in Virginia is assured counsel in only one segment of the proceedings that together comprise the first full appellate review of the trial. Defendants who retain their own counsel can and will be represented both on direct appeal and in any subsequent collateral proceedings. As a result, non-indigent defendants are in a position to press a claim of ineffective assistance of counsel that is functionally unavailable to indigent defendants.^{13/}

^{13/} The log : of Douglas and Griffin also protects the right to counsel in the first appeal subsequent to the trial court's ruling on post-conviction relief. Application of this principle requires that this Court extend the right of counsel in state collateral proceedings to the first level of state review of such proceedings. In Virginia, the first level of collateral review occurs in the Virginia Supreme Court.

Even if the Equal Protection Clause would not ordinarily require the appointment of counsel for collateral review in Virginia courts, this Court should require counsel when life is at stake. The Equal Protection Clause does not remove all disadvantages suffered by the poor. But when a state proposes to execute an individual, the strongest possible case exists for attempting to assure that a particular defendant's poverty is not the factor that makes the difference in whether the defendant is executed or spared. See e.g., Ake v. Oklahoma, 470 U.S. at 76-77.

A decision not to require counsel in Virginia collateral proceedings means that an uncounseled, possibly illiterate or barely literate prisoner under sentence of death must make the legal and tactical decisions, binding under Virginia law, that

will control the ultimate shape of review of that sentence. This result offends the guarantees of both the Due Process and Equal Protection Clauses. Certainly the obstacles faced by an indigent prisoner confined to Death Row in preparing a Virginia habeas petition alleging ineffective assistance of counsel and involving facts outside the record are even greater than those that Clarence Gideon faced in attempting to represent himself without a lawyer on a charge of burglary. Gideon, supra. To deny counsel in state collateral proceedings under these circumstances is to fail to give effect to the concerns for fundamental fairness that animated Gideon.

III. THE DECISION BELOW CORRECTLY ASSURES
MEANINGFUL ACCESS TO THE COURTS FOR
VIRGINIA DEATH ROW INMATES AS REQUIRED
BY BOUNDS v. SMITH

In Bounds v. Smith, 430 U.S. 817, 828
(1977), this Court held "that the funda-
mental constitutional right of access to
the courts requires prison authorities to
assist inmates in the preparation and
filing of meaningful legal papers by pro-
viding prisoners with adequate law librar-
ies or adequate assistance from persons
trained in the law." Applying that princi-
ple in Bounds itself, this Court upheld a
district court plan designed to "assure the
indigent defendant an adequate opportunity
to present his claims fairly." Id. at

823.^{14/} As defined by the Court, the
relevant constitutional inquiry "is
. . . whether law libraries or other forms
of legal assistance are needed to give
prisoners a reasonably adequate opportunity
to present claimed violations of fundamen-
tal constitutional rights to the courts."

^{14/} The plan adopted by the district court in
Bounds provided for law libraries in conjunction
with an inmate self-help training program under
which prisoners would be trained as research
assistants to aid fellow prisoners. Id. at 820.
In approving the district court's choice of
remedy, this Court recognized that a state may
choose among a variety of alternatives to satisfy
Bounds, including:

the training of inmates as paralegal
assistants to work under lawyers'
supervision, the use of paraprofessionals and
law students, either as volunteers or in
formal clinical programs, the organization of
volunteer attorneys through bar associations
or other groups, the hiring of lawyers on a
part-time consultant basis, and the use of
full-time staff attorneys, working either in
new prison legal assistance organizations or
as part of public defender or legal services
offices.

Id. at 831.

Id. at 825. "[T]he touchstone," the Court stated, is "meaningful access to the courts." Id. at 823, quoting Ross v. Moffitt, 417 U.S. at 611.^{15/}

By requiring Virginia to provide death-sentenced prisoners with counsel in state post-conviction proceedings, the district court did no more than what was required by the rationale of Bounds. The district court made findings of fact based upon the record that indicated that the Commonwealth was not in compliance with its obligation to provide meaningful access to the courts to death-sentenced prisoners. As respondents' statement of facts demonstrates, the district court findings are amply supported by the record. Adhering to

^{15/} The Bounds Court emphasized that legal assistance for prisoners is particularly important in the context of collateral attacks and civil rights actions. Bounds, 430 U.S. at 827-828.

this Court's instruction in Anderson v. City of Bessemer City, 470 U.S. 564 (1985), the Court of Appeals refused to disturb these findings as clearly erroneous. 847 F.2d at 1121. Nor did the Court of Appeals find that the district court abused its discretion in fashioning the remedy selected. Id., citing Milliken v. Bradley, 433 U.S. 267 (1977).

A. Virginia's Law Library Plan Does Not Satisfy Its Obligation Under Bounds v. Smith

Experience has shown that prisoners who are not permitted direct access to a law library, and must rely solely on a paging system, are denied meaningful access to the courts. This is precisely the situation at two of Virginia's three facilities confining death-sentenced prisoners. By opting for this system, the Commonwealth places itself at odds with a long line of

cases that have rejected similar paging systems. See Toussaint v. McCarthy, 801 F.2d 1080, 1110 (9th Cir. 1986); Green v. Ferrell, 801 F.2d 765, 772 (5th Cir. 1986); Morrow v. Harwell, 768 F.2d 619 (5th Cir. 1985); Corgain v. Miller, 708 F.2d 1241, 1250 (7th Cir. 1983); Williams v. Leeke, 584 F.2d 1336, 1338-39 (4th Cir. 1978), cert. denied, 442 U.S. 911 (1979). The reasons why a paging system does not afford sufficient Sixth Amendment protection were most cogently articulated in the Fourth Circuit's decision in Williams v. Leeke, 584 F.2d at 1339:

Simply providing a prisoner with books in his cell, if he requests them, gives the prisoner no meaningful chance to explore the legal remedies he might have. Legal research often requires browsing through various materials in search of inspiration; tentative theories may have to be abandoned in the course of research in the face of unfamiliar adverse precedent. New theories

may occur as a result of a chance discovery of an obscure or forgotten case. Certainly a prisoner, unversed in the law and the methods of legal research, will need more time or more assistance than the trained lawyer in exploring his case. It is unrealistic to expect a prisoner to know in advance exactly what materials he needs to consult.

Unless it can be said that death-sentenced prisoners at these two facilities are gaining access to the courts through other means -- a claim the record belies -- Virginia has failed in its Bounds obligation to these prisoners.^{16/}

^{16/} One of the facilities at which Death Row prisoners are denied direct access to the law library is the Virginia State Penitentiary. This is the institution where death-sentenced inmates are confined for the final two weeks preceding execution. Va. Code §3.1-234. It undermines the principles announced in Bounds to deny Death Row inmates access to a law library at a time so close to execution.

At Mecklenburg Correctional Center (where the majority of death-sentenced inmates are confined), the policy is different: prisoners are allowed two half-day periods in the law library weekly. In practical terms, however, the result is the same. While most prisons can boast of a handful of "jailhouse lawyers," prisoners by and large are unschooled in the law and the methods of legal research. The problem is particularly acute for the large number of illiterate and Spanish-speaking prisoners.^{17/} See Bounds v. Smith, 430 U.S. at 823-824; Wolff v. McDonnell, 418 U.S. 539, 578 (1974). Even a well-stocked prison library is inadequate, therefore, to satisfy Bounds in the absence of an effective

^{17/} See n.7, supra.

plan for providing prisoners with the realistic assistance they need.

Indeed, the history of Bounds following its remand from this Court underscores the inadequacy of a library plan as a means of achieving meaningful access to the courts. See Smith v. Bounds, 813 F.2d 1299 (4th Cir. 1987), aff'd en banc, 841 F.2d 77, cert. denied, 109 S.Ct. 176 (1988). After reviewing a decade of unsuccessful efforts by the state to implement the plan approved by this Court in Bounds, including the training program for inmate paralegals to assist fellow prisoners, the Court of Appeals affirmed the trial court's order providing prisoners with attorney assistance in conjunction with the operation of a law library. Id. at 1301-02.^{18/}

^{18/} Numerous cases following Bounds have found law library plans inadequate. See Valentine v. Beyer,
(continued...)

In this regard, too, the problems of Death Row inmates are especially acute. As the district court correctly found, persons on Death Row suffer handicaps and face special complexities that render them incapable of using law books to raise their claims.^{19/} Under Bounds, the state is obligated to respond to those needs and

^{18/} (...continued)
850 F.2d 951, 956-957 (3d Cir. 1988); Cruz v. Hauck, 627 F.2d 710 (5th Cir. 1980); Hadix v. Johnson, 694 F.Supp. 259 (E.D.Mich. 1988); Canterino v. Wilson, 562 F.Supp. 106 (W.D.Ky. 1983).

^{19/} Three considerations led the district court to the conclusion that Death Row access to the courts was inadequate:

- (1) the limited amount of time Death Row inmates had to prepare and present their petitions to the courts;
- (2) the complexity and difficulty of the legal work; and
- (3) the emotional instability of inmates preparing themselves for impending death.

Giarratano v. Murray, 668 F.Supp. 511, 513 (E.D.Va. 1986).

provide whatever assistance is necessary to render the right of access meaningful. As discussed below, the Commonwealth's response to its obligation was to establish a "patchwork system of assistance" that did little to enhance the meaningfulness of the access death-sentenced prisoners have to the courts. Giarratano, 668 F.Supp. at 515. That response is patently inadequate.

B. Virginia's Plan For Legal Services Does Not Satisfy Its Obligation Under Bounds

In Bounds, this Court stated that among the alternatives by which a state may provide prisoners with meaningful access to the courts is the hiring of lawyers. Bounds, 430 U.S. at 831. In an effort to fulfill this obligation, Virginia has opted to provide the services of seven part-time lawyers. They are expected to meet the needs of not only the thirty-two prisoners

on Death Row, but also those of over two thousand other prisoners. Not surprisingly, the scope of their assistance is very limited. They neither sign pleadings nor make court appearances. They are relegated to the role of legal advisor only, or to borrow the phrase of one such attorney, they function as "talking law books." Giarratano v. Murray, 668 F.Supp. at 514.

The state made no pretense at trial that these few attorneys could handle the needs of Death Row prisoners in addition to providing assistance to other inmates. The district court's findings in this respect are unequivocal:

Although no institutional attorney has helped to prepare the habeas corpus petition of a single death row inmate, the testimony at trial indicated that each attorney could not adequately handle more than one capital case at a time. Moreover, they are not hired to work full time; they split time between their

private practice and their institutional work.

Id. at 514.

In addition to the contract services provided by these attorneys, Virginia courts have the authority to appoint counsel to any indigent inmate in a state post-conviction proceeding. Va.Code §14.1-183. In practice, appointments are made under this provision only after a petition is filed by the inmate and then only if a non-frivolous claim is raised.^{20/} Darnell v. Peyton, 208 Va. 675, 160 S.E.2d 749 (1968). The existence of this statute is relied upon by the Commonwealth as evidence that it is meeting its obligation under Bounds.

^{20/} This limitation does not appear on the face of the statute but petitioners noted it in their brief. See Petitioners' Brief at 6.

The short answer to this defense, however, is that Bounds specifically rejected a parallel argument based on a North Carolina statute similar to the one on which Virginia relies here. The Bounds Court stated the following:

Since our main concern here is "protecting the ability of an inmate to prepare a petition or complaint," it is irrelevant that North Carolina authorizes the expenditure of funds for appointment of counsel in some state post-conviction proceedings for prisoners whose claims survive initial review by the courts.

430 U.S. at 828 n.17 (citations omitted).^{21/}

Finally, we urge this Court to recognize, as the district court did, that

^{21/} Moreover, as the district court correctly found, even assuming that all Death Row prisoners with meritorious claims are capable of filing petitions with at least one nonfrivolous ground, the delay in receiving comprehensive assistance of counsel may be devastating because of the waiver provisions of Virginia law discussed above.

because of the complexity, cost, and protracted nature of death penalty litigation today, very few attorneys are willing to volunteer their time to represent Death Row prisoners in post-conviction efforts.

Giarratano, 668 F.Supp. at 515. The financial and emotional toll is staggering. The amicus brief of the American Bar Association (ABA) submitted in this case comprehensively addresses this unfortunate state of affairs, and argues persuasively for the appointment of counsel in post-conviction proceedings. As the number of death-sentenced prisoners continues to increase nationwide, there is no indication that the number of attorneys willing to represent them is increasing proportionately.

Indeed, the evidence proffered at trial and presented by the ABA directly refutes that

suggestion.^{22/} The stakes are simply too high to entrust the lives of nearly two thousand condemned prisoners^{23/} to the chance that some lawyer will provide his or her services voluntarily.

^{22/} In addition to other impediments, Death Rows are frequently located in remote areas that are difficult for counsel to reach. Mecklenburg itself is an eight hour round-trip drive from Washington and a five hour round-trip from Richmond. As late as 1984, it was not uncommon for attorneys of this office to have to wait hours before seeing their clients, only to see them in shackles. Brown v. Landon, Civ. No. 81-0853-12 (E.D. Va. Oct 2, 1984) (bench opinion granting preliminary injunction). This kind of environment certainly does not encourage counsel to step forward.

^{23/} Capital Punishment 1987, supra n.7.

CONCLUSION

For the reasons stated herein, the decision below should be affirmed.

Respectfully submitted,

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No. 88-411

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

EDWARD W. MURRAY, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS, et al.,

Petitioners,

— against —

JOSEPH M. GIARRATANO, et al.,

Respondents.

**MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF
NATIONAL LEGAL AID & DEFENDER ASSOCIATION,
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE
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IN SUPPORT OF RESPONDENTS**

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EDWARD W. MURRAY, DIRECTOR

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v.

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Respondents.

MOTION FOR LEAVE TO
FILE BRIEF AMICUS CURIAE

National Legal Aid & Defender
Association ("NLADA"), National
Association of Criminal Defense Lawyers
("NACDL), and California Attorneys for
Criminal Justice ("CACJ") respectfully
move this Court for leave to file the
attached brief amicus curiae in support
of respondents. Respondents have
consented to the filing of such a brief.
The consent of Petitioners was requested,
but Petitioners have withheld their
consent.

NLADA is a private, nonprofit
organization committed to the provision

of high quality legal services for poor people in the United States. With respect to death penalty litigation, NLADA has promulgated Standards for the Appointment and Performance of Counsel in Death Penalty Litigation, publishes a newsletter focused on trends in all phases of death penalty litigation, and conducts training programs for attorneys in this area. NACDL is a membership organization of criminal defense attorneys from throughout the country dedicated -- through education, legislation and litigation -- to protect the constitutional rights of its members'

clients. Sharing the concerns of NLADA and NACDL, CACJ is the criminal defense bar for the State of California, where almost all of the two hundred men on California's Death Row are indigent and require legal assistance in state post-conviction litigation.

NLADA, NACDL and CACJ are thus particularly well-situated to articulate to this Court the complexities and difficulties unique to post-conviction capital litigation and the benefits, both to the interests of the litigants themselves and to the interests of the judicial system in efficiency and

fairness, of the presence of counsel at all phases of such litigation. These factors, inter alia, provided the basis for the decision below of the United States Court of Appeals for the Fourth Circuit, sitting en banc.

NLADA, NACDL, and CACJ believe that they can provide valuable insights into these factors and illuminate other issues that may not be stressed by the parties. The attached brief emphasizes that capital litigation has always occupied a unique constitutional status, particularly with respect to the assistance of counsel. This unique

status, founded on the practical difficulties of death penalty litigation, the singular finality of the punishment and the consequent demand for heightened procedural safeguards in all phases of capital litigation, requires affirmance of the Fourth Circuit's en banc decision.

Accordingly, NLADA, NACDL and CACJ respectfully request that their motion for leave to file the attached brief amicus curiae be granted.

Dated: January 13, 1989

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October Term, 1988

EDWARD W. MURRAY, DIRECTOR

VIRGINIA DEPARTMENT OF
CORRECTIONS, et al.,

Petitioners,

v.

JOSEPH M. GIARRATANO, et al.,

Respondents.

BRIEF OF NATIONAL LEGAL AID &
DEFENDER ASSOCIATION, NATIONAL
ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS, AND CALIFORNIA ATTORNEYS
FOR CRIMINAL JUSTICE AS AMICI
CURIAE IN SUPPORT OF RESPONDENTS

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In our adversarial system of justice, the formidable complexities of death penalty jurisprudence are often entangled in the byzantine intricacies of post-conviction review. In such a system, to face death alone, without the availability of appointed counsel, is cruel, unusual, and a denial of meaningful access to the courts. Accordingly, NATIONAL LEGAL AID & DEFENDER ASSOCIATION, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, and CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE submit this amicus brief in support of the respondents.

INTERESTS OF THE AMICI CURIAE

National Legal Aid & Defender Association

Founded in 1911, the NATIONAL LEGAL AID & DEFENDER ASSOCIATION ("NLADA") is a private, nonprofit organization committed

to the provision of high quality legal services for poor people in America. NLADA has long recognized the need for competent counsel at all stages of death penalty cases.

In response to the need for quality representation in death penalty cases, NLADA recently adopted Standards for the Appointment and Performance of Counsel in Death Penalty Cases ("NLADA Standards"). The NLADA Standards are an attempt to improve the representation afforded to poor defendants in the high stakes, complex litigation that characterizes death penalty cases.

NLADA also publishes Capital Report, which periodically features articles on trends in the trial, appellate, and post-conviction stages of death penalty cases. In addition, NLADA plans to conduct a training program for attorneys

practicing in states where lawyers in death penalty cases currently receive little or no training.

National Association of Criminal Defense Lawyers

Amicus NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ("NACDL") and its affiliated organizations have approximately 20,000 members, primarily attorneys who practice criminal defense, from throughout the country. NACDL strives, through public education, legislation and litigation, to protect the constitutional rights of its members' clients as a class, and to assure that the working conditions for lawyers in this field are adequate to permit them to protect their clients' rights in individual cases.

NACDL believes in working for a rational system of review of capital judgments in which the legal issues can be resolved in a thorough and methodical process at as early a stage as possible. NACDL joins in this brief out of a perception that the District Court's order in this case was necessary to preserve indigent convicts' rights and to promote such a thorough and methodical system of review.

California Attorneys For Criminal Justice

Amicus CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE ("CACJ") is the criminal defense bar for the State of California. It has approximately 2100 members. CACJ shares the concerns expressed by NACDL above. Virtually 100% of the approximately two hundred men on California's Death Row are indigent and

require legal assistance in state post-conviction collateral proceedings from appointed or pro bono counsel.

Counsel are routinely appointed in California in a manner consistent with the District Court's order in this case; as a result, the issues are probably more thoroughly reviewed than in other states before cases reach the federal courts. However, although counsel are offered an hourly rate of \$60, and California has approximately 80,000 active attorneys in good standing, recruitment of counsel to handle post-conviction collateral proceedings is still difficult, and approximately 20 Death Row inmates are currently unrepresented even on appeal. Accordingly, CACJ joins with amici NLADA and NACDL because the California experience demonstrates that adequate representation of capital convicts and

systematic review of their cases in state post-conviction collateral proceedings is infeasible without a system of routine appointment of counsel.

SUMMARY OF ARGUMENT

The complexities of capital post-conviction proceedings pose formidable difficulties for even experienced lawyers and present virtually insurmountable obstacles for those with little or no legal training. For the poorly educated inmates on America's death row, to confront the intricate maze of death penalty jurisprudence and post-conviction procedure without the assistance of counsel is nothing less than a denial of meaningful access to the courts.

Both Congress and this Court have long recognized the special need for counsel in the unique circumstances of

death penalty litigation. With respect to the necessity of counsel, there remains a significant constitutional difference between capital and non-capital cases.

The presence of counsel in capital habeas proceedings brings needed order to the capital post-conviction process by benefitting not only litigants but also courts in capital habeas proceedings. What is truly at stake in this case is not the finality of Virginia's judgments but rather the high standard of procedural integrity necessitated by the finality of death.

In a capital case, counsel should be available even to those without capital. As a constitutional matter, a poor man requires the assistance of counsel not only when he approaches the steps of the trial courthouse but also when he is

nearest the steps of the gallows; the procedural safeguards of the eighth amendment do not disappear at the stage of litigation closest to the execution date.

ARGUMENT

I. WITHOUT THE CONTINUING ASSISTANCE OF COUNSEL, DEATH ROW INMATES LACK MEANINGFUL ACCESS TO THE COURTS.

A. Capital Post-Conviction Proceedings, Which Are Complex And Difficult For Lawyers And Judges, Are Impenetrable Mysteries For Death Row Inmates.

As organizations deeply familiar with the legal services afforded death row inmates in America, amici reject Petitioners' contention that post-conviction review in capital cases is not so uniquely complex and demanding as to require representation by counsel. Amici have long recognized that a death penalty

case, especially at the post-conviction stage, is an extraordinarily difficult and complicated type of litigation.

Amicus NLADA, for example, warns practitioners that capital post-conviction proceedings can be even more intricate and demanding than the actual capital trial:

Representing a death-sentenced client in post conviction proceedings is as demanding as -- or, if that is possible, even more demanding than -- the tasks faced by other capital counsel. Especially when a death warrant has been signed, counsel is subjected to demands virtually impossible to meet physically, economically, temporally and emotionally. Seeking to ward off imminent execution while continuing to challenge the validity of the client's conviction and sentence may require filing pleadings almost simultaneously in several courts (often some distance apart). Investigation of factual issues may be necessary, and consultation

with the client will require counsel's time and presence at yet another location.

NLADA Standards at 13.

NLADA's perspective is widely shared by commentators familiar with death penalty litigation and by judges who have dealt with post-conviction capital proceedings; it is also supported by the uncontradicted record below. Professor Michael Mello, a frequent defender of indigent death row inmates, has observed that those clients "cannot meaningfully pursue post-conviction litigation on their own" and "[e]ven lawyers find capital post-conviction to be among the most complex, nuanced, and rapidly changing litigation." Mello, Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row, 37 Am. U.L. Rev. 513, 531 (1988) (emphasis in original).

After reviewing just some of the complexities facing a habeas petitioner, Professor Mello concludes that the law "would be incomprehensible to the pro se petitioner in the best of circumstances. It is to many lawyers." Id. at 543.

Judges who have dealt with post-conviction capital cases agree. The Honorable John C. Godbold, a Judge of the United States Court of Appeals for the Eleventh Circuit, warns prospective practitioners in the field that "[h]abeas corpus is as unfamiliar to a lot of lawyers as atomic physics, Godbold, "Pro Bono Representation of Death Sentenced Inmates", 42 The Record of the Association of the Bar of the City of New York 859, 863 (November 1987), and that

A death penalty case will be as difficult and demanding litigation as you will ever participate in. It will require a substantial

investment of time. The law is difficult. It's complex. It changes every week. Research is tough. The case will be emotionally draining no matter how hard you steel yourself against it.

Id. at 871.

The uncontradicted record amply supports these observations of practitioners, judges and the court below. At trial, plaintiffs' expert John C. Boger, who has monitored America's Death Row since 1978, testified that the complexity and difficulty of capital post-conviction proceedings is such that he had never known a death row inmate capable of representing himself in such matters (Tr. 31-32). He added:

In matters of legal research, capital cases are particularly difficult, and although some clients are bright and could understand one stage of a proceeding sometimes, and one facet of the criminal law, very few can integrate the

procedural and substantive and the constitutional questions that are needed in order to make accurate assessments of what issues have merit and what don't.

(Tr. 32-33).

Yet, because of the procedural complexities inherent in this area, an accurate assessment of what issues have merit and what do not is particularly important in the state post-conviction petition, which Mr. Boger identified as "often the most critical single document in the capital litigation." (Tr. at 17) This is particularly true in Virginia, where all claims, the facts of which are known at the time of filing, must be raised in that petition or are lost forever. See Giarratano v. Murray, 847 F.2d 1118, 1120 n.4. (1988)

Empirical data demonstrates the necessity of lawyers in capital post-

conviction proceedings. Although not confined to capital habeas, one study of habeas corpus, commissioned by the Federal Justice Research Program, concluded that there was a "dramatic correlation between counsel involvement and a petitioner's chances for winning relief," including a success rate for represented petitioners fifteen times greater than that for pro se petitioners. Allen, Schachtman & Wilson, Federal Habeas Corpus and its Reform: An Empirical Analysis, 13 Rutgers L.J. 675, 746-47 (1982); see also Robinson, An Empirical Study of Federal Habeas Review of State Court Judgments 58 (1979) (presence of counsel raised success rate from 3% to 12%); Mello at 565-66; NLADA Standards at 5.

In light of the very nature of our adversarial system of justice, such

empirical data is hardly surprising. In a case decided earlier this Term, this Court stated:

The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth - as well as fairness - is "best discovered by powerful statements on both sides of the question."

Penson v. Ohio, 57 U.S.L.W. 4020, 4022 (Nov. 29, 1988) (citations omitted). Nowhere is the need for truth and fairness -- and hence the need for vigorous representation -- greater than in capital litigation. Cf. Beck v. Alabama, 447 U.S. 625, 637-38 (1980).

"As a general matter," the Court in Penson stated, "it is through counsel that all other rights of the accused are protected." 57 U.S.L.W. at 4022.

Without the assistance of counsel, death row inmates lack meaningful access to the courts. For the poorly educated death row inmate who is bereft of counsel, habeas corpus is but an empty Latin phrase. Just as the "need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage," Id., neither does it come to an abrupt halt as a capital case moves to the habeas stage.

The immense complexity, difficulty and importance of capital post-conviction proceedings in our adversarial system of justice should suffice to dismiss any notion that counsel are not crucial to the adjudication of capital habeas proceedings in state courts. Whether on appeal or in a habeas proceeding, contact with the trial attorney may be critical, and "[t]he court, of course, is not in

the position to conduct such ex parte communications." Penson at 4022 n.5. Not only are judges ill-positioned to act as advocates for pro se litigants, but they also require the "powerful statements on both sides of the question" provided by counsel. As Judge Godbold explained in discussing capital habeas cases:

[W]e [judges] need not feel superior about our knowledge. Much of this law is new to state trial judges, who are the judges in the trenches trying to apply it. The average state trial judge will see a death penalty case only rarely. I see twelve or fifteen a year. The average state trial judge may see one every two or three years.

Godbold at 865. In short, lawyers are necessary not only for the death row inmate but also for the arbiter determining his fate.

B. The Significant Constitutional Difference Between Death And Lesser Penalties Requires That the Continuing Assistance Of Counsel Be Made Available to the Condemned.

From both a practical and a constitutional standpoint, death differs from lesser punishments. Precisely because death is different, nowhere is the need for the continuing assistance of counsel more acute than in capital cases.

The special need for counsel in the unique circumstances of death penalty litigation is not, as Petitioners suggest, a recent invention but can be traced back to the birth of the republic. In § 29 of the Act of April 30, 1790, the First Congress provided for the appointment of up to two counsel in capital cases.¹ It is surely of no small

1. The statutory descendant of § 29 of the Act of April 30, 1790 is 18 U.S.C. (footnote continued)

significance that the Congress which proposed the Bill of Rights clearly and unequivocally expressed a heightened concern for the assistance of counsel in capital cases. Cf. Marsh v. Chambers, 463 U.S. 783, 794 (1983) (discussing practices of the "same Congress that drafted the Establishment Clause").

When faced with the issue of the availability of counsel, this Court has not hesitated to recognize the unique circumstances surrounding the imposition of society's ultimate penalty. In Powell v. Alabama, 287 U.S. 45 (1932), the Court viewed with a critical eye "the casual

(footnote continued from previous page) § 3005. Apart from the severity and finality of the death penalty, a potential reason for the enactment -- and reenactment -- of this provision is Congress' realization that capital cases are complex. See United States v. Watson, 496 F.2d 1125, 1128 (4th Cir. 1973).

fashion" in which "the matter of counsel in a capital case was disposed of." Id. at 56. In Powell, the Court based its holding on several facts, none of which was more influential and controlling than the fact that the defendants were facing death without the benefit of counsel:

In the light of the facts outlined in the forepart of this opinion - the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives -- we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.

[U]nder the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of

counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment.

Id. at 71 (emphasis added); see also Hamilton v. Alabama, 368 U.S. 52, 55 (1961) ("When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted") (emphasis added).

For the purposes of assessing the need for counsel in death penalty litigation, there is a significant constitutional difference between capital and non-capital cases. For example, even before Gideon v. Wainwright established that the Sixth Amendment's guarantee of counsel is a fundamental right made obligatory upon the states by the fourteenth amendment, 372 U.S. 335 (1963), due process alone was sufficient to require the appointment of counsel in

capital cases. Bute v. Illinois, 333 U.S. 640, 674 (1948). Moreover, in Gideon, the Court did not base its holding on the dubious assumption that there is never a constitutional difference between capital and non-capital crimes. Justice Clark was the sole justice to express the view that the "Constitution makes no distinction between capital and non-capital cases," 372 U.S. at 349, a position that the Court has since explicitly rejected on numerous occasions. See, e.g., Beck v. Alabama, 447 U.S. 625, 637 (1980) ("As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments").

II. THE FINALITY OF DEATH -- NOT THE FINALITY OF STATE COURT JUDGMENTS -- IS THE CONTROLLING FACTOR IN THIS CASE.

Though Virginia speculates that the appointment of post-conviction counsel will generate a morass of litigation undermining the finality of its judgments, a contrary result is far more likely. Law professors, judges, and practitioners have long recognized that ill-prepared habeas petitions from unrepresented prisoners clog dockets and waste judicial time and energy. Noting that "[c]ourts directly benefit from the fact that most potential litigants first present their problems to competent lawyers who then engage in the necessary investigation and legal research to properly counsel the client in the merits of his case," Judge Lay of the United

States Court of Appeals for the Eighth Circuit wrote that "[t]here would be much merit if we could emulate this practice in the area of post-conviction litigation." Lay, Modern Administrative Proposals for Federal Habeas Corpus: The Rights of Prisoners Preserved, 21 De Paul L. Rev. 701, 734 (1972).

Urging the appointment of counsel in post-conviction proceedings, one law professor recently stated:

... 95 percent of all habeas cases are filed by the uneducated prisoners themselves.... Giving prisoners lawyers would not only help assure fairness, but would make the cases clearer, allowing them to be more efficiently, and finally, disposed of.

Kannar, Liberals and Crime, The New Republic 19, 23, (Dec. 19, 1988) (emphasis supplied).

Of course, not only courts benefit from the assistance of counsel; the concentration of judicial efforts on pro se petitions, unassisted by the trained advocates so central to our adversary system, thwarts the vindication of the very rights sought to be protected by post-conviction review. As Justice Jackson warned, "[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search." Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring); see also Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 25 (1956) ("it is not a needle we are looking for in these stacks of paper, but the rights of a human being").

Once taken, life, unlike liberty or property, cannot be restored. The unequivocal finality of execution has a constitutional dimension that cannot be overridden by Virginia's speculations that the finality of its judgments will be somehow diminished. This is a case where the finality of death -- not the finality of state court judgments -- is the preeminent factor.

III. THE PROCEDURAL SAFEGUARDS OF
THE EIGHTH AMENDMENT DO NOT
EVAPORATE WITH THE ONSET OF
POST-CONVICTION PROCEEDINGS.

The eighth amendment regulates not merely the substantive but also the procedural aspects of the death penalty. Ford v. Wainwright, 477 U.S. 399, 405 (1986) ("[T]he Eighth Amendment has been recognized to affect significantly both the procedural and the substantive

aspects of the death penalty").

Invalidating Florida's procedure for ascertaining the sanity of death row inmates, the result in Ford is a telling reminder that the eighth amendment's procedural safeguards do not suddenly disappear after the conclusion of a capital trial and appeal.

Contrary to the assertions of Petitioners (Pet. Br. at 20 n.2), a majority of the Court in Ford did not explicitly -- or even implicitly -- find that the eighth amendment's procedural protections have no application in the context of capital post-conviction proceedings. Though Petitioners contend that Justice Powell's concurring opinion in Ford explicitly rejected the constitutionally-mandated need for heightened procedural safeguards in the post-conviction stages of capital cases

(Pet. Br. at 20 n.2), Justice Powell's concurring opinion contains no such statement, explicit or implicit. Justice Powell merely wrote that this Court's decisions imposing heightened procedural requirements at the trial and sentencing stages do not apply in a context where the only question is not whether, but when, an execution should take place: "This question [of when an execution may take place] is important, but it is not comparable to the antecedent question of whether petitioner should be executed at all". Ford at 425 (Powell, J., concurring). Indeed, the reasoning of Justice Powell's concurring opinion requires the application of heightened procedural safeguards in those post-conviction proceedings where the question raised is whether, rather than when, an execution may take place.

In short, capital habeas petitions, which typically raise the question of whether there should be an execution at all, are entitled to the procedural protections afforded by the eighth amendment, and this Court has never held otherwise.

Although Petitioners describe "state post-conviction review of a state criminal judgment" as a "matter peculiarly committed to the States' authority," (Pet. Br. at 17), state post-conviction proceedings do not occupy a realm beyond the protections of the United States Constitution. For example, in Smith v. Bennett, 365 U.S. 708 (1961), the Court held that a mandatory \$4 filing fee was an unconstitutional impediment to indigent state prisoners pursuing state habeas corpus relief in state courts.

Though Petitioners have couched their argument in the lofty terms of states rights and "comity," their real quarrel is with the fourteenth amendment insofar as it incorporates and makes applicable to the states the basic protections of the Bill of Rights. The Fourth Circuit, sitting en banc, did not mandate a "radical departure" from existing law. Petitioners, on the other hand, are essentially proposing a "radical departure" in their effort to carve out an area of state procedure insulated from the Constitutional safeguards that have historically accompanied the imposition of the death penalty.

CONCLUSION

For the above reasons, the decision of the Fourth Circuit, sitting en banc, should be affirmed.

Respectfully submitted,

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BRIEF OF THE AMERICAN BAR ASSOCIATION
AS AMICUS CURIAE
IN SUPPORT OF RESPONDENTS

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No. 88-411

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988
ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EDWARD W. MURRAY, DIRECTOR VIRGINIA
DEPARTMENT OF CORRECTIONS, et al.,

Petitioners,

v.

JOSEPH M. GIARRATANO, et al.,

Respondents.

BRIEF OF THE AMERICAN BAR ASSOCIATION
AS AMICUS CURIAE
IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

The American Bar Association ("ABA") submits this brief as amicus curiae to provide the Court significant information about the national context in which this case has arisen. The consents of both the petitioners and the respondents

have been obtained and are on file with this Court.

The ABA is a voluntary, national membership organization of the legal profession. Its more than 350,000 members, from each state, territory and the District of Columbia, include prosecutors, public defenders, private lawyers, trial and appellate judges from the state and federal courts, legislators, law professors, law enforcement and corrections personnel, law students and a number of "non-lawyer" associates in allied fields. Since its inception over a century ago, the ABA has taken an active interest in promoting the availability and effectiveness of counsel as a crucial element in ensuring fundamental fairness in our adversary system of criminal justice.

The ABA has taken no position regarding the propriety or constitutional-

ity of the death penalty, and it does not discuss herein the specific constitutional law which the parties' briefs are addressing. The ABA has, however, been working to ensure that the death penalty is not imposed without the most careful consideration and full compliance with defendants' constitutional and legal rights. To this end, the ABA initiated in 1986 a Death Penalty Post-Conviction Representation Project. The project attempts to locate volunteers to represent death row inmates and supports efforts to create an organized structure for providing qualified, compensated counsel in capital post-conviction proceedings. The ABA has also over the past several years commissioned several studies on the actual experiences of counsel handling post-conviction death penalty cases. Hence, to the extent that the constitutional issue in this case

turns on what actually constitutes "meaningful access" to the courts for death row inmates in state post-conviction proceedings, the ABA believes it can provide the Court with important insights.

The ABA has concluded that if state post-conviction proceedings are to help ensure that no person is put to death following a trial tainted by serious constitutional error, capable attorneys must be provided to death row inmates before their post-conviction petitions are filed. The ABA has also concluded that there simply are not, and will not be, enough volunteers to represent properly the ever-increasing numbers of death row inmates whose cases are proceeding into state post-conviction proceedings. Hence, even while trying to find volunteers to handle cases as a stop-gap measure, the ABA has recognized that the only feasible way to

provide death row inmates with meaningful access to the courts is the implementation in each state which imposes capital punishment of a governmentally-funded system under which qualified, compensated attorneys represent death row inmates in state post-conviction proceedings.

The ABA's current intensive efforts to encourage the creation of such a system in each death penalty state is a logical outgrowth of prior ABA actions, including its House of Delegates' adoption of three resolutions in the past decade. In 1979, the ABA proposed "that the United States Supreme Court adopt a rule providing for appointment of counsel to prepare petitions for discretionary review of state court convictions, including appropriate post-conviction or clemency petitions, if necessary, in death penalty cases where the defendant cannot afford to

hire counsel * * *."1 In 1982, the ABA resolved to "support the prompt availability of competent counsel for both state and federal court proceedings" in post-conviction and habeas corpus. The ABA also stated that counsel handling such proceedings "should be trained to present in the state courts the facts and legal precedents which form the basic federal constitutional issues raised by the cause" and should be compensated "at a fair rate of payment * * *."2

Most recently, in 1988, the ABA urged "each federal district and circuit court to adopt and each federal circuit

¹ Resolution 102B, approved by ABA House of Delegates at 1979 Midyear Meeting. Should the Court be interested, the ABA would be willing to lodge with the Clerk of the Court a copy of Resolution 102B and the other sources cited in this brief.

² Resolution 112D, approved by ABA House of Delegates at 1982 Annual Meeting.

judicial council to approve a plan for providing representation in federal habeas corpus death penalty proceedings which includes" a variety of provisions designed to ensure that trained, experienced and pre-screened attorneys (a) are appointed to represent death row inmates, (b) are properly compensated, (c) are provided with investigative, expert and other services, and (d) are advised by state and regional resource centers.³ The 1988 ABA resolution became the basis for the new Paragraph 2.01G to the Guidelines for the Administration of the Criminal Justice

³ Resolution 125, approved by ABA House of Delegates at 1988 Midyear Meeting. Resolution 125 also urged the federal courts "to consult extensively with appropriate state criminal justice leaders to ensure the maximum extent of coordination and consistency concerning the standards and procedures governing appointment of counsel in state and federal post-conviction proceedings involving death penalty cases."

Act, 18 U.S.C. § 3006A, which was approved by the Judicial Conference of the United States in September 1988.

SUMMARY OF ARGUMENT

The ABA believes that death row inmates cannot meaningfully articulate or litigate their factually and legally complex claims in state post-conviction proceedings without representation by capable counsel. The existence of many significant claims cannot be determined from death row. Moreover, many death row inmates lack the mental capacity to formulate even bare-bones post-conviction petitions. Where the consequence of failing to uncover and argue effectively about serious constitutional violations is the prisoner's death, the injustice is especially harsh. Meaningful access to state post-conviction remedies can be achieved only if the state government provides the

prisoner with properly qualified, compensated, assisted and monitored counsel.

The judiciary, the organized bar and Congress have all taken actions designed to provide counsel to death row inmates, and substantial progress has been made in many states. However, Virginia is almost unique in having failed to make any movement towards a system for providing its death row inmates, through qualified counsel, with meaningful access to state post-conviction courts. In the absence of such access, there is a grave risk that persons will be subjected to the ultimate penalty despite convictions or sentences imposed through fundamental constitutional error.

Argument

I.

MEANINGFUL ACCESS TO STATE POST-CONVICTION
COURTS REQUIRES CAPABLE AND PROPERLY
COMPENSATED COUNSEL

A. State Post-Conviction Proceedings
In Capital Cases Are Extremely
Significant And Extraordinarily
Complex

Post-conviction proceedings in capital cases are both tremendously important and highly complex. They are often essential to the vindication of a capital defendant's rights to a fair trial and to a reliable capital sentencing proceeding, since they frequently concern issues which could not reasonably have been raised at trial or on direct appeal. Their significance is evident from the large percentage of cases in which convictions or sentences have been set aside in federal habeas corpus proceedings because of fundamental constitutional error -- following exhaustion of the constitutional claims in state

courts. Former Chief Judge Godbold said in 1987 that in the Eleventh Circuit, which generally "handles more habeas death penalty cases than all the other circuits in the United States combined,"⁴ the writ had been granted in half of the first 56 capital cases to come before the District or Circuit Court, and he guessed "that probably now a third of the cases have constitutional error of such dimension that the petitioner is entitled to an order."⁵

Judge Godbold has also stressed the enormous complexity of these cases, stating, "the body of law that exists is complex. It's difficult. It's change-

⁴ Godbold, Pro Bono Representation of Death Sentenced Inmates, 42 The Record of the Association of the Bar of the City of New York 859, 862 (1987).

⁵ Id. at 873.

able. And it's very hard to apply."⁶ Indeed, he has stated that, "it is the most complex area of the law I deal with,"⁷ and that "the average trial lawyer, no matter what his or her expertise, doesn't know any more about habeas than he does about atomic energy."⁸

Increasingly, state judges, too, have come to recognize the tremendous complexity of capital litigation. For example, Maryland Court of Appeals Chief Justice Robert C. Murphy stated in his 1987 annual message to the General Assembly that the proper application of capital punishment statutes

⁶ Id. at 865.

⁷ "You Don't Have To Be A Bleeding Heart," dialogue between Judge Abner J. Mikva and John C. Godbold at the Conference of Southern Bar Presidents held at the ABA 1986 Midyear Meeting, 14 Human Rights 22, 24 (Winter 1987).

⁸ Id.

proved extremely difficult and complicated, resulting in a high incidence of appellate reversals * * * because the Constitution of the United States, or the provisions of the death penalty statutes themselves, were violated in a way that mandated that new trials or resentencing hearings will be held.⁹

B. Pro Se Death Row Inmates Cannot Be Expected To Prepare Petitions Stating Their Meritorious Claims

Death row inmates cannot reasonably be expected to prepare state post-conviction petitions setting forth constitutional claims which, if properly articulated, would immediately be recognized as

⁹ Chief Justice Robert C. Murphy, Court of Appeals, Maryland, State of the Judiciary Message, Jan. 28 1987, delivered to a Joint Session of the General Assembly of Maryland, at 12-13. See also Evans v. State, 441 So. 2d 520, 528 (Miss. 1983) (Robertson, J., dissenting), cert. denied, 467 U.S. 1264 (1984) (As "frequently" occurs, "numerous important and highly technical death penalty issues" which are wholly unfamiliar to "the average Mississippi criminal defense lawyer" were "not raised" although "[m]ost * * * have resulted in death sentences being vacated in other cases.").

substantial and ultimately be held meritorious. This is so because of (1) the nature of many such claims, whose very existence cannot be determined from death row and (2) the inability of many death row inmates -- due to such problems as illiteracy, mental retardation and mental illness -- to articulate even those claims which theoretically could be formulated from death row.

1. The Existence Of Many
Meritorious Claims Cannot
Be Determined From Death Row

Experience has demonstrated that many meritorious constitutional claims cannot possibly be pleaded, even in a primitive way, by a pro se death row litigant. Determining that there is a factual basis for these claims requires the collection and evaluation of facts outside the existing record.

For example, without the assistance of counsel, the petitioner in Amadeo v. Kemp, 108 S.Ct. 1771 (1988), could not have known, much less alleged, that his conviction and death sentence were unconstitutional. The fact that the prosecutor had deliberately but surreptitiously induced the jury commission to underrepresent blacks and women in jury pools was uncovered by counsel in an unrelated case, and evidence supporting Amadeo's claim for relief was then marshalled and litigated by volunteer counsel for several years.¹⁰

¹⁰ Other capital convictions and sentences have also been held unconstitutional on the basis of racial discrimination whose existence could not have been determined from death row. The discrimination has been uncovered only through volunteer counsel's laborious review of jury lists to identify the race and sex of thousands of jurors. See, e.g., Berryhill v. Zant, 858 F.2d 633 (11th Cir. 1988) (unconstitutional underrepresentation of women); Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982), cert. denied, 459 U.S. 1127 (1983) (women unconstitutionally excluded in grand and petit jury selection procedure).

A frequently meritorious claim which could not be formulated from death row is that the prosecution withheld at trial information that was either exculpatory or else showed that a prosecution witness had struck a deal as a price for testifying. Determining that such unconstitutional prosecutorial conduct has occurred requires careful investigation which a death row inmate cannot undertake.

For example, the conviction and death sentence were reversed in Lindsey v. King, 769 F.2d 1034 (5th Cir. 1985), after it was established that the prosecutor had withheld evidence that a key eyewitness -- who at trial had positively identified Lindsey as the assailant -- had told the police shortly after Lindsey's arrest that he could not identify the perpetrator. The facts supporting this claim were developed in state and federal post-

conviction proceedings in which Lindsey, who was mentally retarded, was represented by counsel. Id. at 1038-40.¹¹

Similarly, counsel's post-conviction investigation uncovered unconstitutional prosecutorial misconduct directed against Warren McCleskey. The federal district court held, on the basis of this new evidence, that state authorities unconstitutionally planted a witness in the cell next to McCleskey's and actively solicited information from the witness long after McCleskey had obtained counsel. McCleskey v. Kemp, No. C87-1517A (N.D. Ga. Dec. 23, 1987).

¹¹ The Fifth Circuit said its "reading of the evidence shows there is a real possibility that the wrong man is to be executed." 769 F.2d at 1043. See also McDowell v. Dixon, 858 F.2d 945 (4th Cir. 1988) (failure to disclose reports raising questions about reliability of the identification violated due process).

In other cases, counsel working on post-conviction proceedings have uncovered facts which have raised such serious doubts about death row inmates' guilt or innocence that their convictions have been overturned. In a recent example, John Henry Knapp was released in 1987 after spending 12 years on Arizona's death row. His pro bono attorneys, who worked more than 3,000 hours and spent over \$75,000 in out-of-pocket expenses, presented expert testimony that the fire which killed Knapp's children could have been caused by the children's playing with matches. At trial, the prosecution's experts had testified that only a flammable liquid could have caused the fire.¹²

¹² See Smethurst, "Knapp Update: 'Innocent Man,'" American Lawyer (April 1987), at 80; United Press Int'l, Feb. 14, 1987 story (LEXIS, Nexis library, current file). The murder charges against Knapp were subsequently dismissed without prejudice. See United Press (Footnote continued)

Ineffective assistance of counsel is another constitutional claim for which the essential factual predicates have often been uncovered only in counsel's post-conviction investigations.¹³ Many death row inmates represented by counsel have been able to meet the heavy burden imposed by Strickland v. Washington, 466 U.S. 668 (1984), by establishing

(Footnote 12 continued from previous page)
Int'l, Dec. 22, 1987 story (LEXIS, Nexis library, current file).

¹³ As this Court has recognized, "collateral review will frequently be the only means through which an accused can effectuate the right to counsel," because "[a] layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance" * * * [and thus] will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case." See Kimmelman v. Morrison, 477 U.S. 365, 378 (1986) (citation omitted).

both the ineffectiveness and prejudice necessary to prevail on such claims.¹⁴

In most cases, the petitioner must present substantial evidence from outside the trial record in order to set forth a viable Sixth Amendment claim. An example is Curry v. Zant, 258 Ga. 527, 371 S.E. 2d 647 (1988).

Curry's trial counsel failed to seek an independent psychiatric evaluation, although the trial judge had said he would allow one. A state psychiatrist had concluded that while Curry suffered from organic brain damage and a borderline personality disorder, Curry might be malingering and manipulating. After plead-

¹⁴ See, e.g., Evans v. Lewis, 855 F.2d 631, 636-39 (9th Cir. 1988); Stephens v. Kemp, 846 F.2d 642, 651-55 (11th Cir. 1988); Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Ruffin v. Kemp, 767 F.2d 748, 752 (11th Cir. 1985); Tyler v. Kemp, 755 F.2d 741, 744-46 (11th Cir. 1985) (*per curiam*).

ing guilty and then being sentenced to death, Curry sought post-conviction relief. In state habeas proceedings, volunteer counsel presented evidence from three mental health experts and other witnesses. They established that Curry was mentally retarded, suffered from severe mental illness, was incapable of waiving his constitutional rights, and either could not tell right from wrong or else could not control an impulse to act wrongfully. Id., 258 Ga. at 528-29, 371 S.E. 2d at 648-49. The Georgia Supreme Court held that the Sixth Amendment was violated by the failure to secure and present an accurate account of Curry's mental disabilities. Id., 258 Ga. at 530, 371 S.E. 2d at 649.¹⁵

¹⁵ Curry exemplifies numerous cases in which a meritorious Sixth Amendment claim has been meaningfully presented only because volunteer counsel was available. Another example is (Footnote continued)

Many other types of substantial constitutional claims have succeeded only because of counsel's exhaustive post-conviction investigations which could not have been done from death row. These include showings that pretrial publicity

(Footnote 15 continued from previous page)

Armstrong v. Dugger, 833 F. 2d 1430 (11th Cir. 1987). Trial counsel was held to have been ineffective after post-conviction counsel presented, inter alia, an expert who testified that -- unbeknownst to the trial jury -- Armstrong was mentally retarded and had organic brain damage. See also Jones v. Thigpen, 788 F.2d 1101, 1103 (11th Cir. 1986), cert. denied, 107 S. Ct. 1292 (1987) (trial counsel held ineffective for failing to present any mitigating evidence on behalf of defendant, whom expert testimony in federal habeas showed was mentally retarded and emotionally disturbed). Most decisions holding trial counsel constitutionally ineffective have been based on substantial evidence demonstrating both ineffectiveness and prejudice. E.g., Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986) (psychiatric, family, employment and school witnesses supported Sixth Amendment claim); Middleton v. Dugger, 849 F.2d 491, 493-95 (11th Cir. 1988) (comprehensive psychiatric history evidence introduced).

rendered the trial fundamentally unfair¹⁶ and that a capital defendant was too mentally limited to have intelligently waived his constitutional rights to silence and counsel.¹⁷ Moreover, without counsel to litigate in and obtain information from courts in other states, death row inmates would not even have known -- much less alleged and proved -- that their sentences were partially based on inaccurate infor-

¹⁶ E.g., Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985), cert. denied, 476 U.S. 1164 (1986) (granting relief on claim based on pre-trial publicity, in view of substantial evidence collected and presented in habeas corpus proceeding).

¹⁷ E.g., Smith v. Zant, 855 F.2d 712 (11th Cir. 1988) (granting relief in view of expert witness who testified in habeas corpus hearing that Smith was mentally retarded and under severe stress when waiving his Miranda rights). See also Agan v. Dugger, 835 F.2d 1337, 1339 (11th Cir. 1987), cert. denied, 108 S.Ct. 2846 (1988) (case remanded for hearing on Agan's competence, in view of evidence -- presented by habeas counsel -- of a history of mental problems dating back to Agan's youth).

mation about supposedly valid prior convictions, and thus were unconstitutional. See Johnson v. Mississippi, 108 S.Ct. 546 (1988); U.S. ex rel. Lewis v. Lane, 832 F.2d 1446 (7th Cir. 1987).¹⁸

The need for post-conviction counsel to uncover meritorious constitutional claims whose factual predicates have been totally unexplored by trial counsel may be particularly great in Virginia. Several respondents in a recent study on capital cases conducted for Virginia bar and legislative groups said the fact that Virginia is "at or near the bottom for attorney fees paid across the

¹⁸ Collateral litigation, such as that which led to the granting of relief in Johnson, is also often required to obtain discovery of (a) proceedings concerning co-defendants and (b) pretrial media coverage. See Mello, Facing Death Alone: The Post-Conviction Attorney Crisis On Death Row, 37 Am. U.L. Rev. 513, 545 (1988).

country" has led to inadequate representation by trial counsel.¹⁹ Articulating the general frustration of Virginia trial counsel, one attorney said, "the most dedicated lawyer can only do so much with no help -- no investigators, no experts."²⁰ Moreover, the study found that Virginia has no formal or specific qualifications for trial lawyers in capital cases and that they received "quite limited training."²¹

¹⁹ See "Study of Representation in Capital Cases In Virginia" (November 1988), prepared for Criminal Law Section, Virginia State Bar and Joint Subcommittee Studying Alternative Indigent Defense Systems, Virginia General Assembly; prepared by the Spangenberg Group (cited hereinafter as "Virginia Study"), at 25.

²⁰ Id. at 28. Several respondents said support services and back-up resources were "largely unavailable." Id. at 27.

²¹ Id. With respect to criminal cases generally, the study found that "by all measures, Virginia remains at or near the bottom in expenditures, cost per case and assigned counsel fees for indigent defense * * * [and] has slipped even further behind the rest of the nation [than in 1982] by 1986." Id. at 55.

2. Substantial Numbers Of Death Row Inmates Are Incapable Of Articulating Even Those Meritorious Claims Which Do Not Require Additional Investigation

As a recent law review article explains, many death row inmates cannot articulate even those meritorious claims which do not require further factual investigation, because they "are illiterate, uneducated, mentally impaired or any combination of the three."²² A Florida federal district judge found in 1982, after extensive evidentiary hearings, that over half of Florida's overall prison population were functionally illiterate and 22% had I.Q.s under 80.²³ A 1979 study of Florida's death row inmates found that their mean educational level was approxi-

²² See Mello, supra note 18, at 548.

²³ See Hooks v. Wainwright, 536 F. Supp. 1330, 1336-37 (M.D. Fla. 1982), rev'd on other grounds, 775 F.2d 1433 (11th Cir. 1985), cert. denied, 479 U.S. 913 (1986).

mately the 9th grade and that 15% had I.Q.s under 90.²⁴

This Court²⁵ and the lower courts²⁶ have frequently decided cases involving inmates suffering from mental

²⁴ Lewis, Killing the Killers: A Post-Furman Profile of Florida's Condemned, 25 Crime and Delinq. 200, 211 (1979).

²⁵ See Eddings v. Oklahoma, 455 U.S. 104, 107 (1982) (severe emotional disturbance); Ake v. Oklahoma, 470 U.S. 68 (1985) (mental illness); Ford v. Wainwright, 477 U.S. 399 (1986) (severe mental illness). In a case presently before the Court, Penry v. Lynaugh, cert. granted, 108 S. Ct. 2896 (1988), there is substantial evidence suggesting that the petitioner is mentally retarded.

²⁶ See Lindsey, Curry, Armstrong, Jones and Agan, discussed supra; see also Smith v. Zant, 855 F.2d 712 (11th Cir. 1988); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); Bowen v. Kemp, 832 F.2d 546 (11th Cir. 1987) (en banc), cert. denied, 108 S.Ct. 1247 (1988); Profitt v. Waldron, 831 F.2d 1245 (5th Cir. 1987); Magwood v. Smith, 791 F.2d 1438, 1449-50 (11th Cir. 1986); Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986); Wallace v. Kemp, 757 F.2d 1102, 1108 (11th Cir. 1985); Strickland v. Francis, 738 F.2d 1542, 1551-52 (11th Cir. 1984); Spraggins v. State, 258 Ga. 32, 33, 364 S.E. 2d 861, 863 (1988); Holloway v. State, 257 Ga. 620, 621, 361 S.E.2d 794, 796 (1987).

retardation or other substantial mental disabilities.

Inmates with mental disabilities frequently have difficulty assisting counsel who seek to protect their interests. They are hardly capable of formulating meaningful pro se petitions in the absence of counsel.²⁷ Moreover, as illustrated by Curry, Armstrong and Jones, discussed supra, the post-conviction cases of mentally disabled death row inmates often involve claims concerning their mental disabilities and require consultation with various types of medical and mental health professionals. Meaningful articulation and development of these claims requires competent counsel.

²⁷ See Mello, supra note 18, at 550-52.

C. Volunteers Cannot Solve The Meaningful Access Problem

1. ABA Studies Highlight The Enormous Burdens Which Limit The Number Of Volunteer Attorneys Available To Handle State Post-Conviction Proceedings

Over a period of over two years, the ABA's Bar Information Program and other ABA and state bar and legislative groups have sponsored several comprehensive surveys of attorneys who have represented death row prisoners in state post-conviction (and federal habeas corpus) proceedings. These studies demonstrate that due to the enormous complexity of state post-conviction capital proceedings, attorneys have expended huge amounts of time and money and have become emotionally drained. Accordingly, the ABA is convinced that it is, and will continue to be, impossible to find sufficient volunteer attorneys to handle these cases on a pro bono basis.

A 1987 survey for the ABA of attorneys handling post-conviction proceedings in capital cases in 24 states revealed that the attorney hours were "extremely high" and the out-of-pocket expenses for state post-conviction plus federal habeas averaged well over \$10,000.²⁸ In state post-conviction proceedings (encompassing trial level, state supreme court and certiorari), the median time for the entire sample of lawyers was

²⁸ See "Time and Expense Analysis in Post-Conviction Death Penalty Cases" (February 1987), at 15, 20, prepared for ABA Post-Conviction Death Penalty Representation Project, ABA Section of Individual Rights and Responsibilities, ABA Standing Committee on Legal Aid and Indigent Defendants, Bar Information Program; Data Compilation and Analysis Performed by the Spangenberg Group, a national criminal justice research and consulting firm. The median expenses were \$4,000 for the entire sample of lawyers and \$13,556 for those who could document their time. The average expenses were \$11,887 for the entire sample and \$20,068 for those with documentation. See id. at 20.

665 hours. For those who could document their time, the median was 963 hours.²⁹

Many of the volunteers who responded to this ABA survey commented on the substantial time commitments and complexity involved in handling these cases. One attorney, who has been involved in several types of major, protracted civil litigation, said:

No case I have ever handled compares in complexity with my Florida death penalty case. * * * [T]here is nothing more difficult, more time consuming, more expensive, and more emotionally exhausting than handling a death penalty case after conviction.³⁰

Another attorney said that death penalty litigation is unique in "every aspect of the case: research, investigation, time,

²⁹ Id. at 13-14. Hundreds of additional hours were found to have been spent on federal habeas corpus proceedings. Id.

³⁰ Id. at 22.

length of pleadings, etc." and that the "emotional costs * * * border on the inhumane."³¹ A third lawyer said that his firm's great expenditures had "led to a real opportunity to win this case," but added that, although he would like to take on a similar case in the future, "I will unfortunately be unable to do so because of the enormous potential expenses."³² A fourth attorney said that he had never handled a case involving more work, and that "despite the tremendous number of hours expended thus far, I believe that I easily could have productively spent at least 50 percent more time on this matter than the exigencies of my practice and court schedules have allowed."³³ A fifth lawyer said he had "never seen such a

³¹ Id.

³² Id. at 23.

³³ Id.

logistical nightmare, in the midst of the most difficult and time consuming case that I have handled in over 20 years of practice."³⁴

In 1988, two additional studies using virtually the same methodology as the ABA's 1987 nationwide study focused on North Carolina³⁵ and Virginia.³⁶ The Virginia results for state post-conviction, and the comparable results concerning median attorney hours nationwide, in North Carolina and in Florida (for which figures were obtained as part of the nationwide study), are as

³⁴ Id.

³⁵ "Time And Expense Analysis In Post-Conviction Death Penalty Cases In North Carolina" (June 1988), sponsored by ABA Bar Information Program; prepared for Administrative Office of the Courts, North Carolina; prepared by the Spangenberg Group (cited hereinafter as "North Carolina Study").

³⁶ Virginia Study, supra note 19.

follows:³⁷

	Post- Conv. Trial Level	Post- Conv. State S. Ct.	Cert. from Post- Conv.	Total State Post- Conv.
Avg. Hours: Va.	633	235	124	992
Med. Hours: Va.	450	210	120	780
Med. Hours: Nat'l	400	200	65	665
Med. Hours: N.C.	482	92	38	612
Med. Hours: Fla.	500	240	77	817

The Virginia study also estimated the expenses for the first phase of state post-conviction, i.e., the trial level Circuit Court proceeding, but stressed that these estimates could be too low. The median expense was estimated at \$2500 for that phase and the average expense at \$3686.³⁸

³⁷ See id. at 37, 39. Total State Post-Conviction hours are the sum of the three other columns.

³⁸ See id. at 47-49.

As in the nationwide study, the North Carolina and Virginia studies quoted attorneys' descriptions of their experiences in representing indigent death row inmates in post-conviction proceedings. Attorneys described these cases as complex, exhausting, emotionally and financially devastating and extraordinarily time-consuming. Three typical descriptions (the first two regarding North Carolina, the third concerning Virginia) follow:

- Post-conviction cases can have a devastating effect on an attorney both financially and emotionally. It consumes overwhelming amounts of time, energy and work. * * * For example, preparing the Motion for Appropriate Relief in state trial court took two full weeks of my time, that is, working all day, evenings, and weekends for two weeks on one case. The reason it takes such a lot of time is that you're scared to death that if you leave out an issue which a federal court in another district may decide favorably on

the next day, you have waived the issue forever.* * *

* * * * *

We are accused by judges and prosecutors of engaging in delay or dilatory tactics, but this is simply not true. They don't understand how much time and work it takes to locate a witness. In some cases they are dispersed all over the country. They could be anywhere. Then once you've located the witness it can take two or three trips to see him in order to convince him to answer your questions because somebody's life is at stake.³⁹

* * * * *

These are horrible cases -- thankless cases. I had no idea how many hours I would have to spend when I got in on the case. There are so many needs in this area that it is mind boggling -- money, decent library, computers, tracking, full-time attorneys, investigators, brief bank. With no compensation there is no incentive for a lawyer to take a case. On the other hand, the Attorney General's Office has whatever resources it needs.

³⁹ North Carolina Study, supra note 35, at 20-22.

They will pay whatever it takes. This is grossly unfair.⁴⁰

It is apparent from these various studies that capital post-conviction litigation makes extraordinary demands on counsel -- professionally, financially and emotionally -- and that, as a result, many attorneys are unwilling to undertake such representation as volunteers. But only qualified, dedicated and properly guided lawyers can provide death row inmates with meaningful access to the courts.⁴¹

⁴⁰ Virginia Study, supra note 19, at 50.

⁴¹ Unfortunately, experience has shown that "constraints of time and finances" have caused many volunteers to do a poor job in handling post-conviction proceedings for death row inmates. (See Jt. App. 78.) But where the volunteers have had enough time, resources and guidance from attorneys with expertise in this area of the law, they have been able to do the serious factual and legal research which has frequently enabled them to demonstrate constitutional errors. (See Jt. App. 55-60, 67, 75-78.)

2. There Are, And Will Be,
Insufficient Volunteers To
Represent Death Row Inmates
In State Post-Conviction
Proceedings

Distinguished jurists have recognized, consistent with the various studies discussed above, that volunteers will not represent the growing numbers of death row inmates with cases entering state post-conviction and then federal habeas corpus proceedings. Justice Powell has noted that Florida began providing death row inmates with state-funded counsel in state post-conviction and habeas corpus proceedings "because of the inadequacy of using volunteer lawyers * * *."⁴² Judge Godbold has pointed out that the demands on existing "volunteers became so heavy and the pressure of cases so intense that

⁴² Remarks of Justice Lewis F. Powell, Jr. at Eleventh Circuit Judicial Conference, Atlanta, Ga. (May 12, 1986), at 8-9.

these traditional sources [of volunteers have] seriously diminished."⁴³ He has also summarized several important reasons why volunteers have been increasingly difficult to find in capital cases:

Taking a habeas death case is not something most lawyers want to do. In the first place, it's hard. It is the most complex area of the law I deal with. In the second place, it's often done on an emergency basis. Third, the death penalty just isn't imposed on people for trivial things. The community is often inflamed. The press is often inflamed. The state trial judge is often inflamed if you question what he did. The trial counsel is often inflamed if you must question what he did. Your client seldom appreciates what you do and may end up accusing you of being ineffective counsel. And there isn't any glory in it.* * *⁴⁴

Thus, as the several recent studies for the ABA and other bar and legislative groups show:

⁴³ Godbold, supra note 4, at 866.

⁴⁴ 14 Human Rights (see supra note 7), at 24.

[T]he pool of volunteer lawyers cannot expand rapidly enough to meet the growing need. As all [the] studies demonstrate, the time and effort required for the representation of the indigent defendant on death row is enormous, and the rewards are intangible. No study can document the emotional cost associated with the representation of a person whose sole lifeline may be the volunteer attorney. Comments submitted by volunteer attorneys * * * reflect the frustration and disenchantment of some of these practitioners. While a valuable asset to representation of death row inmates, a system of volunteer counsel cannot be a long-term solution.⁴⁵

D. For Meaningful Access To The Courts, Death Row Inmates Must Have Properly Qualified, Compensated, Assisted And Monitored Counsel

The ABA believes there are four essential requirements for according death row inmates meaningful access to state

post-conviction courts. First, following direct appeals, qualified attorneys should be appointed to represent death row inmates in filing and litigating state post-conviction petitions. Second, the attorneys should be fairly compensated for both their time and their expenses, as should investigators, expert witnesses and others whose assistance is reasonably required for proper representation. Third, if these attorneys are not themselves experts in handling state post-conviction proceedings for death row inmates, they should be provided, at government expense, with guidance from attorneys who are experts in this area. Fourth, those experts should be responsible for monitoring the performance of the appointed attorneys, to ensure that they undertake sufficient factual investigations and appropriate legal

⁴⁵ Wilson and Spangenberg, State Post-Conviction Representation Of Defendants Sentenced To Death, (as-yet unpublished manuscript, Dec. 1988), at 19.

research and prepare competent pleadings and briefs.⁴⁶

II.

VIRGINIA IS A RARE EXCEPTION TO THE
GROWING TREND TOWARDS PROVIDING DEATH
ROW INMATES WITH MEANINGFUL ACCESS TO
THE COURTS

A. The Judiciary, The Bar And
Congress Have Acted To Provide
Death Row Inmates With Counsel

The judiciary, the organized bar and Congress have all recently taken actions designed to provide death row inmates with competent counsel in state post-conviction and federal habeas corpus proceedings.

Perhaps the first federal circuit court to do so was the Eleventh Circuit, which "got involved in it because we ran out of lawyers to file habeas peti-

⁴⁶ The experts should notify the court if an appointed attorney's work is inadequate.

tions in death cases in the federal system."⁴⁷ Justice Powell complimented the Eleventh Circuit for its efforts in this area in 1986 and stressed that "perhaps the most critical need is an organized program for the representation by counsel of death row prisoners."⁴⁸

In February 1987, the Conference of Chief Justices, which consists of the chief judicial officers of every state and territory and the District of Columbia, urged the judicial leadership in each state having the death penalty to take action to assure that death row inmates receive competent legal representation in post-conviction proceedings. The Chief Justices resolved that each state's judi-

⁴⁷ 14 Human Rights (see supra note 7), at 23.

⁴⁸ Remarks of Justice Powell, supra note 42, at 8.

cial leadership should quickly begin a planning process involving executive and legislative representatives, the organized bar, and prosecutors and defense counsel experienced in death penalty litigation "to establish a regular process for appointing, providing expert guidance for, and fairly compensating competent counsel to prepare and pursue state post-conviction petitions for all state death row inmates wishing to pursue such remedies * * *."⁴⁹

⁴⁹ Resolution IX, "Representation of Death Row Inmates In Post-Conviction Proceedings," adopted at the 10th Midyear Meeting of the Conference of Chief Justices on February 5, 1987, in Gleneden Beach, Oregon (emphasis added). The Chief Justices also proposed that each state's judicial leadership enter into a dialogue with representatives of the federal courts "to assure continuity of representation of death row inmates in state and federal post conviction proceedings and an equitable apportioning of the costs of such representation between the state and federal judicial systems." Id.

The ABA has recognized the need for the organized bar to play an active role in the creation of the kind of program which Justice Powell and the Conference of Chief Judges have advocated. Following a vote of its Board of Governors in August 1986, the ABA has committed significant resources to the ABA Death Penalty Post-Conviction Representation Project. This project, which many sections of the ABA co-sponsor,⁵⁰ is attempting to find volunteers on a short-run basis while mounting "a nationwide educational campaign to convince state legislatures, courts, the Congress, bar associations and the public generally that the long-term

⁵⁰ The project is co-sponsored by the Section of Individual Rights and Responsibilities, the Criminal Justice Section, the Litigation Section, the General Practice Section, the Senior Lawyers' Division, the Young Lawyers' Division and the Standing Committee on Legal Aid and Indigent Defendants.

systemic solution is * * * adequate state and federal public funding for this purpose."⁵¹

The adoption of a system of government funding is essential because there simply are not, and will not be, enough qualified volunteers to handle these cases properly. That is clear both from the experiences of the ABA's Post-Conviction Death Penalty Representation Project in attempting to find volunteer lawyers and from the ABA's studies discussed above. The ABA has found that, notwithstanding the generosity of many volunteer lawyers, the extraordinary burdensomeness and complexity of capital post-conviction proceedings make it infeasible to rely primarily on volunteers to

handle these cases. The ABA also believes that the quality of post-conviction petitions and supporting briefs will be enhanced by an organized system to provide qualified counsel. This should benefit the courts and the criminal justice system generally, as well as death row inmates.

In March 1987, paragraph 2.14B of the Guidelines for the Administration of the Criminal Justice Act was amended to make it easier to assure "continuity of counsel throughout the state court and federal habeas corpus proceedings * * *."⁵² In proposing this amendment, the Judicial Conference Committee to Implement the Criminal Justice Act clearly

⁵¹ "Why Death Row Needs Lawyers," 14 Human Rights 27 (Winter 1987).

⁵² See March 24, 1987 memorandum from Administrative Office of the United States Courts to all federal appellate and district judges, magistrates, clerks, court executives and federal public/community defenders, at 5; Report of the Proceedings of the Judicial Conference of the United States, March 17, 1987, at 38.

envisioned that well-qualified counsel would represent death row inmates in state post-conviction proceedings.⁵³

Also in March 1987, the Judicial Conference of the United States recognized the value of such state-funded offices as the California Appellate Project in providing assistance to appointed counsel. The California Appellate Project provides appointed attorneys with resource materials, reviews of transcripts, ongoing consultation and comments on their draft pleadings, and it makes recommendations to the courts on attorneys' fees and expenses.⁵⁴ Relying, inter alia, on reports from state court officials on the benefits from using organizations such as the Cali-

⁵³ See March 24, 1987 memorandum, supra note 52, at 5.

⁵⁴ Letter from Michael Millman to Gail Lambert of Washington and Lee Law School (March 19, 1987), at 2.

fornia Appellate Project, the Judicial Conference Committee to Implement the Criminal Justice Act successfully proposed⁵⁵ an amendment to the Guidelines for the Administration of the Criminal Justice Act, which now provide:

Where necessary for adequate representation, subsection (e) of the Criminal Justice Act authorizes the reasonable employment and compensation of public and private organizations (such as the Florida Capital Collateral Representative and the California Appellate Project) which provide consulting services to appointed and pro bono lawyers in capital federal habeas corpus cases in such areas as records completion, exhaustion of state remedies, identification of issues, review of draft pleadings and briefs, etc.⁵⁶

⁵⁵ March 24, 1987 Administrative Office memorandum, supra note 52, at 6-7.

⁵⁶ See id. at 7, quoting paragraph 3.16 of the Guidelines for the Administration of the Criminal Justice Act; Report of the Proceedings of the Judicial Conference of the United States, March 17, 1987, at 38.

As mentioned above, the ABA in February 1988 urged the federal courts to approve plans for appointing trained, experienced and pre-screened attorneys to represent death row inmates in federal habeas corpus proceedings. The ABA said that under such plans, the attorneys should be (a) properly compensated, (b) provided with investigative, expert and other services and (c) advised by state and regional resource centers. The ABA also urged the federal courts "to consult extensively with appropriate state criminal justice leaders to ensure the maximum extent of coordination and consistency" in the provision of counsel to death row inmates in state and federal post-conviction proceedings.⁵⁷

⁵⁷ Resolution 125, approved by ABA House of Delegates at 1988 Midyear Meeting, at 3.

In September 1988, the Judicial Conference of the United States urged federal judges, districts and circuits to take essentially the same actions as the ABA had urged in its February 1988 resolution.⁵⁸

Meanwhile, the ABA and the federal courts were working to encourage the creation of resource centers that, if funded with both state and federal funds, would provide expert legal consulting services to counsel representing death row inmates in state post-conviction and federal habeas corpus proceedings. In June 1988, the ABA's Post-Conviction Death Penalty Representation Project, in conjunction with the Administrative Office of the United States Courts, held a planning

⁵⁸ See Paragraph 2.01G to the Guidelines for the Administration of the Criminal Justice Act, 18 U.S.C. § 3006A.

conference to encourage applications for the funding of such centers.⁵⁹

Resource centers in eight states had received federal funding by autumn 1988. Thereafter, Congress enacted the Anti-Drug Abuse Act of 1988, which provided federal funding for resource centers in five additional states.⁶⁰

Congress took another important action in passing the Anti-Drug Abuse Act. It mandated, inter alia, that any indigent state prisoner under sentence of death "shall be entitled to the appointment of one or more" experienced attorneys and, when reasonably necessary, with "investigative, expert or other services" for

⁵⁹ See Wilson and Spangenberg, supra note 45, at 6.

⁶⁰ See id.; Pub. L. No. 100-690, 102 Stat. 4181, Title X, c.1, reprinted in 134 Cong. Rec. H 11,216 (Daily Ed. Oct. 21, 1988).

federal habeas corpus proceedings under 28 U.S.C. § 2254 and any subsequent post-conviction and clemency proceedings.⁶¹

The statutory policy of this provision of the Anti-Drug Abuse Act will be frustrated if death row inmates lack qualified counsel in state post-conviction proceedings. Exhaustion of federal constitutional claims in state courts is a prerequisite to federal habeas corpus review, but without competent counsel in state post-conviction proceedings, death row inmates will frequently fail to raise meritorious claims in state court.⁶² Thus, in order to effectuate Congress' legislative intent, competent counsel must

⁶¹ See Pub. L. No. 100-690, 102 Stat. 4181, Tit. VII, Sec. 7001(b), to be codified at 21 U.S.C. § 848 (q) (4)-(10), reprinted in 44 Crim. L. Rep. (BNA) 3001, 3018-19 (Nov. 2, 1988).

⁶² See discussion at pages 13-28, supra.

be provided to death row inmates in their state post-conviction proceedings.

B. Virginia Is Virtually Unique
In Failing To Move Towards Providing Death Row Inmates With
Meaningful Access To The Courts

The most recent ABA-sponsored study indicates that Virginia is virtually unique in failing to move towards providing death row inmates with meaningful access to state post-conviction courts. While many other states have not yet succeeded in providing meaningful access in such proceedings, almost all of them -- unlike Virginia -- are moving towards doing so.

Of the thirty states in which death penalty cases have been the subject of state post-conviction proceedings, fourteen provide primary representation "either by a statewide public defender appellate unit or an independent state appellate program." In eight states,

"local trial public defenders or contract programs" are the primary source for representation. Virginia is one of only seven states which use volunteer lawyers as a primary source of representation.⁶³ Five of those seven states (Alabama, Georgia, Louisiana, Mississippi and Texas) "have begun operation of resource centers with a combination of federal, state and private funds."⁶⁴ These resource centers will endeavor to find counsel to represent death row inmates in state post-conviction proceedings and may, in a few instances, provide such representation themselves.⁶⁵

Of the other two states -- Virginia and Arkansas -- Arkansas has not

⁶³ Wilson and Spangenberg, supra note 45, at 10-12, 19 and Table 2.

⁶⁴ Virginia Study, supra note 19, at 70.

⁶⁵ See id.; Wilson and Spangenberg, supra note 45, at 13.

executed anyone since before Furman v. Georgia, 408 U.S. 238 (1972). Virginia, however, has carried out seven post-Furman executions.⁶⁶ Thus, Virginia is the only state which primarily relies on volunteer lawyers, has no resource center, and has nevertheless been executing death row inmates.

The ABA has also recently examined "the practice of providing counsel before the filing of a state post-conviction petition in capital cases."⁶⁷ The study found that of the thirty states where death row inmates have had state post-conviction proceedings, seventeen "provide counsel pre-petition in all cases

⁶⁶ See NAACP Legal Defense and Educational Fund, Inc., Death Row, U.S.A. (Dec. 20, 1988), at 3.

⁶⁷ See Wilson and Spangenberg, supra note 45, at 12.

either through the requirements of state law or as a matter of practice."⁶⁸ Six additional states provide counsel pre-petition "in 'most cases' or 'frequently.'"⁶⁹ Information was not yet available on Utah, Arkansas and Texas, but Texas does have a resource center which will presumably endeavor to find counsel pre-petition.⁷⁰ Only four states -- Pennsylvania, Nebraska, Nevada and Virginia -- were reported not to have any system "to assure provision of counsel prior to the filing of a post-conviction petition."⁷¹

Of those four states, only Virginia has carried out involuntary execu-

⁶⁸ Id.

⁶⁹ Id. at 12-13.

⁷⁰ See id. at 13.

⁷¹ Id.

tions after Furman.⁷² Indeed, since Furman, it has executed more death row inmates than all but four other states.⁷³ In the two states for which there is no information and which do not have resource centers, there has been only one involuntary execution (in Utah).⁷⁴

Hence, Virginia is the only state to have involuntarily executed death row inmates which has no system to assure the provision of counsel prior to the filing of state post-conviction petitions in capital cases.

⁷² See NAACP Legal Defense and Educational Fund, Inc., Death Row, U.S.A. (Dec. 20, 1988), at 3. Nevada has executed two inmates who voluntarily gave up appeals. Id.

⁷³ See id.

⁷⁴ See id. Utah has also executed two inmates who voluntarily gave up appeals. Id.

CONCLUSION

Meaningful access to a state post-conviction court in a capital case requires the provision of capable and properly compensated counsel prior to the filing of the post-conviction petition.

Dated: January 13, 1989

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

EDWARD W. MURRAY, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS, et. al.,
Petitioners,
-v.-

JOSEPH M. GIARRATANO, et. al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE MARYLAND STATE BAR ASSOCIATION,
STATE BAR OF MICHIGAN, NORTH CAROLINA STATE
BAR, SOUTH CAROLINA BAR ASSOCIATION,
WEST VIRGINIA STATE BAR AS AMICI CURIAE
IN SUPPORT OF RESPONDENTS

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MOTION BY THE MARYLAND STATE BAR
ASSOCIATION, STATE BAR OF MICHIGAN,
NORTH CAROLINA STATE BAR, SOUTH
CAROLINA BAR ASSOCIATION, WEST
VIRGINIA STATE BAR FOR LEAVE TO
FILE A BRIEF AS AMICI CURIAE IN
SUPPORT OF RESPONDENTS

Pursuant to Supreme Court Rule 36.3,
the South Carolina Bar Association, the
Maryland State Bar, the State Bar of
Michigan, the North Carolina State Bar and
the West Virginia State Bar move for

leave to file the brief submitted herewith as amici curiae. Counsel for the Respondents have consented to the filing of the brief, but counsel for petitioners would not so consent.

The South Carolina Bar is an organization which consists of all persons licensed to practice law in the state of South Carolina. Currently, the South Carolina Bar has approximately six thousand, six hundred and fifty members. Among the South Carolina Bar's (the "Bar") stated objectives is applying the knowledge, experience, and ability of the legal profession to the promotion of the public good. Consequently, the Bar is concerned that all indigent defendants, and especially all indigent inmates on death row in South Carolina, have meaningful access to the court system. It is the experience of the members of the

South Carolina Bar that this access can only be realized if indigent persons are provided with appointed counsel.

The South Carolina Bar does not believe that relying on volunteers and pro bono assistance provides adequate protection for those whose lives hang in the balance. For this reason, the state has taken measures to assist death row inmates in their post-conviction proceedings. South Carolina recently created the South Carolina Death Penalty Resource Center (the "Center"). The purpose of the Resource Center is to assist appointed counsel in the representation of indigent death row inmates. The creation of the Center is a realization that due to the complexity of capital litigation, even attorneys need the assistance of persons experienced in this area of the law.

The North Carolina State Bar is an organization which consists of all persons licensed to practice law in the state of North Carolina. Currently, the North Carolina State Bar has approximately eleven thousand, five hundred and seventy nine members. Among the North Carolina Bar's (the "State Bar") stated objectives is applying the knowledge, experience, and ability of the legal profession to the promotion of the public good. Consequently, the State Bar is concerned that all indigent defendants, and especially all indigent inmates on death row in North Carolina, have meaningful access to the court system. It is the experience of the members of the North Carolina State Bar that this access can only be realized if indigent persons are provided with appointed counsel. To assist death row inmates in their post-

conviction proceedings, North Carolina has created the North Carolina Death Penalty Resource Center. The purpose of the Resource Center is to assist appointed counsel in the representation of indigent death row inmates.

The Maryland State Bar Association, Inc., is a voluntary professional association which consists of 13,859 member attorneys. Among the purposes of the Maryland State Bar Association, Inc., are to advance the science of jurisprudence, to promote reform in the law, and to facilitate the administration of justice.

The State Bar of Michigan is the association of all licensed lawyers engaged in the practice of law or the administration of justice. It currently has nearly 27,000 active members. Its responsibilities as defined by the

Michigan Supreme Court Rules concerning the State Bar of Michigan include the promotion of improvements of the administration of justice and advancements in jurisprudence. Although this state has never authorized the death penalty in state proceedings, Michigan lawyers as citizens and as members of the legal profession are committed to furthering the fair administration of the death penalty in those states which authorize it in order to prepare themselves for participation in the debate which occurs from time to time as to whether the Michigan death penalty prohibition should be rescinded. Michigan lawyers have also volunteered to represent death row inmates in post-conviction proceedings when it has not been possible to secure the number of counsel needed from among the members of the bar of the particular state.

Recent amendments to federal law pertaining to the sale and distribution of controlled substances authorizing the death penalty have now made that ultimate penalty a reality in our state. Consequently, the bar of Michigan will be directly involved in issues relating to the fair administration of justice in death penalty cases, including the question presented in this case of the right of those who cannot afford to pay for their attorney to have counsel appointed for them.

The West Virginia State Bar is an integrated bar with approximately 4,200 members. According to the Constitution of The West Virginia State Bar, "the objects of the public; to advance the administration of justice and the science of jurisprudence; to improve the relations between the public and the bench and the

bar; to uphold and elevate the standards of honor, integrity, competency and courtesy in the legal profession; and to encourage relations among its members."

The above Bar Associations have a particular interest in the appointment of counsel to represent death sentenced inmates in state and federal post-conviction proceedings due to the compelling interest of all of society in the highest degree of reliability in the imposition of the death sentence. All legal work is complex and difficult, but due to the unique and irrevocable nature of capital punishment, we should be sure that no individual is executed until competent counsel have presented all available grounds for relief to the state and federal courts.

For all these reasons, the South Carolina Bar Association, the Maryland

State Bar, the State Bar of Michigan, the North Carolina State Bar, and the West Virginia State Bar believe that the filing of this amici curiae brief is desirable because it presents to the Court significant information about the context in which this case has arisen. The brief is an amici curiae brief in the truest sense. It provides the Court with a unique perspective which differs from those of the parties and will substantially assist this Court by providing it with a different and important perspective from which to evaluate the facts of this case. With that perspective, the Court will be in a better position to evaluate the particular facts about Virginia and the detailed legal arguments which the parties are presenting in their briefs.

Accordingly, the South Carolina Bar,

the Maryland State Bar, the State Bar of Michigan, the North Carolina State Bar, and the West Virginia State Bar respectfully request the Court to grant this motion for leave to file an amici curiae brief.

Respectfully submitted,

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January 13, 1989

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STATEMENT OF INTEREST OF AMICI CURIAE

The South Carolina Bar is an organization which consists of all persons licensed to practice law in the state of South Carolina. Currently, the South Carolina Bar has approximately six thousand, six hundred and fifty members. Among the South Carolina Bar's (the "Bar") stated objectives is applying the knowledge, experience, and ability of the legal profession to the promotion of the public good. Consequently, the Bar is concerned that all indigent defendants, and especially all indigent inmates on death row in South Carolina, have meaningful access to the court system. It is the experience of the members of the South Carolina Bar that this access can only be realized if indigent persons are provided with appointed counsel.

The South Carolina Bar does not believe that relying on volunteers and pro bono assistance provides adequate protection for

those whose lives hang in the balance. For this reason, the state has taken measures to assist death row inmates in their post-conviction proceedings. South Carolina recently created the South Carolina Death Penalty Resource Center (the "Center"). The purpose of the Resource Center is to assist appointed counsel in the representation of indigent death row inmates. The creation of the Center is a realization that due to the complexity of capital litigation, even attorneys need the assistance of persons experienced in this area of the law.

The North Carolina State Bar is an organization which consists of all persons licensed to practice law in the state of North Carolina. Currently, the North Carolina State Bar has approximately eleven thousand, five hundred and seventy nine members. Among the North Carolina Bar's (the "State Bar") stated objectives is applying the knowledge, experience, and

ability of the legal profession to the promotion of the public good. Consequently, the State Bar is concerned that all indigent defendants, and especially all indigent inmates on death row in North Carolina, have meaningful access to the court system. It is the experience of the members of the North Carolina State Bar that this access can only be realized if indigent persons are provided with appointed counsel. To assist death row inmates in their post-conviction proceedings, North Carolina has created the North Carolina Death Penalty Resource Center. The purpose of the Resource Center is to assist appointed counsel in the representation of indigent death row inmates.

The Maryland State Bar Association, Inc., is a voluntary professional association which consists of 13,859 member attorneys. Among the purposes of the Maryland State Bar Association, Inc., are to

advance the science of jurisprudence, to promote reform in the law, and to facilitate the administration of justice.

The State Bar of Michigan is the association of all licensed lawyers engaged in the practice of law or the administration of justice. It currently has nearly 27,000 active members. Its responsibilities as defined by the Michigan Supreme Court Rules concerning the State Bar of Michigan include the promotion of improvements of the administration of justice and advancements in jurisprudence. Although this state has never authorized the death penalty in state proceedings, Michigan lawyers as citizens and as members of the legal profession are committed to furthering the fair administration of the death penalty in those states which authorize it in order to prepare themselves for participation in the debate which occurs from time to time as to whether the Michigan death penalty

prohibition should be rescinded. Michigan lawyers have also volunteered to represent death row inmates in post-conviction proceedings when it has not been possible to secure the number of counsel needed from among the members of the bar of the particular state.

Recent amendments to federal law pertaining to the sale and distribution of controlled substances authorizing the death penalty have now made that ultimate penalty a reality in our state. Consequently, the bar of Michigan will be directly involved in issues relating to the fair administration of justice in death penalty cases, including the question presented in this case of the right of those who cannot afford to pay for their attorney to have counsel appointed for them.

The West Virginia State Bar is an integrated bar with approximately 4,200 members. According to the Constitution of

The West Virginia State Bar, "the objects of the public; to advance the administration of justice and the science of jurisprudence; to improve the relations between the public and the bench and the bar; to uphold and elevate the standards of honor, integrity, competency and courtesy in the legal profession; and to encourage relations among its members."

The above Bar Associations have a particular interest in the appointment of counsel to represent death sentenced inmates in state and federal post-conviction proceedings due to the compelling interest of all of society in the highest degree of reliability in the imposition of the death sentence. All legal work is complex and difficult, but due to the unique and irrevocable nature of capital punishment, we should be sure that no individual is executed until competent counsel have presented all available grounds for relief

to the state and federal courts.

For all these reasons, the South Carolina Bar Association, the Maryland State Bar, the State Bar of Michigan, the North Carolina State Bar, and the West Virginia State Bar are very interested in this case, which will address whether indigent death sentenced prisoners may secure meaningful access to the courts without the assistance of appointed counsel in capital collateral proceedings.

SUMMARY OF ARGUMENT

This case presents the question whether indigent death sentenced inmates are entitled to court-appointed counsel in state post-conviction proceedings. Based upon the experience of the South Carolina Bar, the only way to provide meaningful access to the courts to indigent individuals on death row is through the appointment of counsel. Many of these individuals are illiterate, some are mentally retarded, others are--to one

degree or another--mentally ill, and thus unable to represent themselves. Any lay person, however, especially one confined in a small cell without financial resources, is unable, due both to the complexity of the law involved in capital litigation as well as the need for intensive factual investigation, to achieve meaningful access to the courts without the assistance of counsel. Therefore, based upon the experience of the Bar, as well as this Court's prior decisions guaranteeing an inmate the right of access to the courts, amicus contends that the United States Court of Appeals for the Fourth Circuit correctly decided that there exists a constitutional right to counsel for indigent death sentenced inmates in state post-conviction proceedings.

ARGUMENT

INDIGENT DEATH ROW INMATES CANNOT ACHIEVE MEANINGFUL ACCESS TO THE COURTS WITHOUT THE ASSISTANCE OF COUNSEL

A. This Court held in
Bounds v. Smith that
prisoners are entitled
to meaningful access to
the courts.

This Court held in Bounds v. Smith, 430 U.S. 817, 828 (1977), that inmates have a "fundamental constitutional right of access to the courts." Bounds was an action, brought pursuant to 42 U.S.C. §1983, by prison inmates in North Carolina. These prisoners sought legal research facilities to assist them in filing habeas corpus petitions and section 1983 claims, and alleged that North Carolina, by failing to provide such facilities, denied them access to the courts in violation of the fourteenth amendment.

This Court agreed, holding that prison authorities are required "to assist inmates in the preparation and filing of meaningful

legal papers" by providing prisoners with either adequate law libraries or assistance from legally trained personnel. Bounds, supra, 430 U.S. at 828. Rejecting the argument that states could not be obligated to expend funds to effectuate such a right, the Court noted that its previous decisions "have consistently required states to shoulder affirmative obligations to assure all prisoners meaningful access to the courts." Id.

This Court emphasized in Bounds that mere "access to the courts" is not enough. Rather access must be "adequate, effective, and meaningful," and it must extend to "all prisoners." Id. at 822, 824. Indeed, Bounds, specifically distinguished "the access rights of ignorant and illiterate inmates... unable to present their own claims in writing to the courts' from those of 'inmates able to present their own cases.'" Id. at 823-24. As an example,

this Court noted that for illiterate inmates, a law library alone is not enough -- meaningful access "required at least allowing assistance from their literate fellows." Id. (emphasis added).

Subsequent to Bounds, courts have recognized that there are classes of inmates whose special circumstances require that they receive more than the minimum assistance permitted by Bounds--a law library--in order to achieve meaningful access. See, e.g., Cruz v. Hauck, 627 F.2d 710, 721 (5th Cir. 1980) (holding that "[l]ibrary books, even if 'adequate' in number, cannot provide access to the courts for those persons who do not speak English or who are illiterate"); Valentine v. Beyer, 850 F.2d 951, 956-57 (3rd Cir. 1988) (recognizing the special needs of closed custody, illiterate, and non-English speaking inmates); Knop v. Johnson, 655 F.Supp. 871, 882 (W.D. Mich. 1987) ("A

court, rather, must measure the adequacy of defendants' system of legal access by the inmates' ability to gain access to the courts through that system. In this case, plaintiffs [illiterate inmates] have established a credible claim that they are not able to gain adequate, effective, and meaningful access to the courts through defendants' system.").¹

¹Petitioners contend that Pennsylvania v. Finley, ___ U.S. ___, 107 S.Ct. 1990 (1987), has resolved the constitutional question presented in this case. In Finley, as the Fourth Circuit recognized, this Court held that the procedural framework of Anders v. California, 386 U.S. 738 (1967), did not apply to attorneys seeking to be relieved in state post-conviction matters. 847 F.2d at 1121. In doing so, this Court determined that, in general, there was no "constitutional right to counsel" for post-conviction proceedings. 107 S.Ct. at 1993.

However, Finley did not address whether requiring the appointment of counsel in post-conviction representation is in every conceivable situation an impermissible remedy for a federal court to order. Merely by characterizing any remedial order providing representation as "creating a new right to counsel," Virginia and other states can similarly oppose--no matter what the facts--every

This Court has never addressed the question whether indigent persons under sentence of death are a class of persons entitled to more than minimum assistance--access to a law library--mandated by Bounds. A majority of the en banc court of appeals in this case determined that they were. Giarratano v. Murray, 847 F.2d 1118,

potential judicial determination that such relief might be warranted. As an example of such a remedial order, the Fourth Circuit found, in a later proceeding in Bounds itself, that North Carolina had engaged in "a decade-old pattern of neglect and delay" to ignore or circumvent this Court's 1977 Bounds decision. 813 F.2d 1299, 1304-05 (5th Cir. 1987), opinion adopted en banc, 841 F.2d 77 (4th Cir. 1988). Because North Carolina had failed to provide meaningful access through adequate law libraries, the Eastern District of North Carolina ordered the remedy of providing North Carolina's prisoners with a prison legal services program. In affirming the decision of the district court, the Fourth Circuit certainly did not address whether Finley divested federal courts of their powers to fashion such relief. Conversely, this Court did not mention Bounds in its Finley decision. Had this Court intended Finley to have the far-ranging preclusiveness Petitioners now urge, the Court would have had to modify its decision in Bounds.

1122 (4th Cir. 1988). This recognition by the Fourth Circuit was well grounded in the prior decisions of this Court, which have consistently underscored the "significant constitutional difference between the death penalty and lesser punishments." See, e.g., Beck v. Alabama, 447 U.S. 625, 637, 100 S.Ct. 2382, 2389, 65 L.Ed.2d 392 (1980); see also Booth v. Maryland, ____ U.S. ____, 107 S.Ct. 2529 (1987) ("death is a punishment different from all other sanctions."). This difference, of course, results from the unique and irrevocable nature of capital punishment. Ake v. Oklahoma, 470 U.S. 68, 87 (1985). Because of the finality inherent in sentencing a person to death, this Court has maintained a commitment to the "'need for reliability in the determination that death is the appropriate punishment in a specific case.'" California v. Brown, 479 U.S. 538, 543 (1987) (quoting Woodson v. North

Carolina, 428 U.S. 280, 305 ((1976))). In addition, this Court has recognized that matters affecting an already condemned prisoner call for "no less stringent standards than those demanded in any other aspect of a capital proceeding." Ford v. Wainwright, 477 U.S. 399, 407 (1986).

For reasons that will be set forth in more detail below, indigent death sentenced inmates cannot achieve meaningful access to the courts without the assistance of counsel.

B. Because the majority of death row inmates are either totally or functionally illiterate, mentally retarded or mentally ill, they are unable to achieve meaningful access to the courts without the assistance of counsel.

There are a number of practical reasons why death row inmates are not able to represent themselves in post-conviction proceedings, even if they were provided

unlimited access to adequate law libraries.

1. Illiteracy

Many inmates are totally or functionally illiterate. In the South Carolina prison system, for example, seventy-five per cent of the inmates read below the sixth grade level.² The figures for prison systems in other states are similar.³ There is no reason to believe that death row inmates are any brighter than those in the general prison population. Thus it no exaggeration to say that the majority of death row inmates are totally or functionally illiterate and thus unable to

²Statistics provided by Meryl Brigman, Department of Education of the South Carolina Department of Corrections.

³In North Carolina, approximately seventy percent of the inmates function below the fifth grade level. In Maryland ninety-two percent of the incoming inmates read below the eighth grade level. (Statistic provided by Maryland and North Carolina Department of Corrections.)

review their transcripts for possible issues, to do legal research, prepare pleadings or take other steps to represent themselves.⁴ This Court itself has previously realized that "jails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited."⁵ It should

⁴Intelligence and educational levels among prisoners as a group are very low. A 1968 study of federal and state prisons found that in most states the average prisoner had only eight years of education. In states with large death row populations, the figures were even more troubling: 40% of Florida inmates completed less than nine years of education; Louisiana inmates averaged six years of schooling; and Texas inmates had an average educational level of 5.1 years. In 1982 a federal district court, following extensive evidentiary hearings, found that more than half of Florida's inmates were functionally illiterate. See Mello, Facing Death Alone: The Post Conviction Attorney Crisis on Death Row, 37 Am.U.L.Rev. 513 (1988).

⁵Johnson v. Avery, 393 U.S. 483, 487 (1969).

come as no surprise that death row does as well.

2. Mental Retardation

Additionally, there are a number of mentally retarded inmates on death row in the country. See Blume, Representing the Mentally Retarded Defendant, The Champion 31 (October 1987); see also Penry v. Lynaugh, 832 F.2d 915, cert. granted 5th Cir. 1987 ___U.S.____, 108 S.Ct. 2896 (1988). Obviously, an individual that is mentally retarded is unable to review the record of his trial, identify any available grounds for collateral relief, do even rudimentary legal research or draft basic pleadings for post-conviction proceedings. See Smith v. Kemp, 849 F.2d 481 (11th Cir. 1988) (mentally retarded person sentenced to death in Georgia did not understand Miranda warnings).

The mentally retarded prisoner is

usually not even capable, of assisting his attorney(s) in conducting post-conviction litigation, much less representing himself.⁶ In many instances these persons are unable to recall details about the events of the crime, or details about their past and background. their educational events. These inabilities prevent a retarded person from explaining to his attorney his role, if any, in crime or the events surrounding his trial. For example, one retarded person sentenced to death in South Carolina, after a motion to vacate his death sentence was denied by a state trial judge, answered in

⁶See generally Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414, 479-84 (1985) (describing difficulties facing mentally retarded defendants at trial); Blume, supra; Mickenberg, Competency to Stand Trial and the Mentally Retarded Defendant: The Need for a Multi-Disciplinary Solution to a Multi-Disciplinary Problem, 17 Cal. W. L. Rev. 365, 387-401 (1981) (enumerating essential mental abilities for any defendant to stand trial and noting mentally retarded defendant's inability to reach these capacities).

response to his attorney's question about how he felt, "I ain't too sure ...I feel good anyway ...I got a new trial."⁷

3. Mental Illness

Further, many death row inmates suffer from a variety of mental illnesses.⁸ See generally, Ford v. Wainwright, 477 U.S. 399

⁷Marcus, Retarded Killer's Sentence Fuels Death-Penalty Debate, Wash. Post, June 22, 1987, at A1, col. 1. His lack of understanding of the proceedings was further revealed during an interview. Arthur was asked what it would mean if he were executed. He answered: "What happens? That's a tough one. For one thing, that learning what I just learned, what I learned in [the penitentiary] that would amount to nothing . . . and my GED [high school equivalency degree], I wouldn't see no GED. I wouldn't get my GED."

⁸Lewis, Pincus, Feldman, Jackson & Bard, Psychiatric, Neurological and Psychoeducational Characteristics of 15 Death Row Inmates in the United States, 143 Am. J. Psychiatry 838, 840-44 (1986); Lewis, Pincus, Bard, Richardson, Feldman, Prichep & Yeager, "Neuropsychiatric, Psychoeducational and Family Characteristics of 14 Juveniles Condemned to Death in the United States" (paper presented to American Academy of Child and Adult Psychiatry, Oct. 1987).

(1986). While the severity of the mental illness varies among individual inmates, a person that is sick cannot be expected to reliably represent themselves in post-conviction proceedings. While many of these inmates were mentally ill prior to being condemned, others became that way while on death row. Ford v. Wainwright. These mental disorders can directly affect an inmate's ability to proceed pro se. For example, it has been found that death row inmates minimize the gravity of their legal situation as a psychological defense mechanism.⁹ Another study has found in condemned prisoners a pattern of shock, denial, and depression, coupled with "a fatalistic belief that the person is a pawn in the process that will coldly and

⁹Bluestone & McGahee, supra.

impersonally result in his death."¹⁰

C. Even death row inmates that have sufficient mental capabilities are not able to adequately represent themselves in collateral proceedings.

Furthermore, even a death sentenced inmate that is not illiterate, mentally retarded or mentally ill, is not able to adequately represent himself in post-conviction proceedings. This is so for a number of reasons.

1. Complexity

First, the substantive law relevant to capital cases is complex, and difficult enough to master for an attorney, much less a lay person with, at best, a high school education.¹¹ Besides being familiar with

¹⁰R. Johnson, *Condemned to Die* 94 (1981).

¹¹This complexity is evident from the number of capital issues resolved by this Court in the twelve years since Gregg v. Georgia, 428 U.S. 153 (1976) was decided.

this Court's Eighth Amendment Jurisprudence, an inmate in post-conviction proceedings must be sure not to engage in a procedural default of even any kind that might later preclude the federal courts in a habeas corpus proceeding from reviewing the merits of a ground for relief. See, e.g. Murray v. Carrier, 477 U.S. 527 (1986); see also Godbold, Pro Bono Representation of Death Sentenced Inmates, The Record of the Association of the Bar of the City of New York 859, 862 (1987).¹²

It is further evidenced by studies of the time spent by attorneys representing death sentenced persons in collateral proceedings. See Report prepared for the American Bar Association by the Spangenberg Group, "Time and Expense Analysis in Post-Conviction Death Penalty Cases," February 1987; see also Brief of Amicus Curiae American Bar Association. The median number of hours spent by counsel in state post-conviction alone was six hundred and sixty five hours. Id.

¹²Judge Godbold, former chief judge of the United States Court of Appeals for the Eleventh Circuit, stated:

"It [capital punishment law] is the

2. Limited access to law library

Furthermore, many condemned inmates are prohibited from gaining physical access to the prison law library, which itself often is inadequate. In South Carolina, for example, inmates must request that specific legal materials be brought to their cells. The same restrictions apply in most other states with persons on death row. Such limited access makes it impossible for an inmate even to keep current with the complex and ever-changing law relevant to capital cases, much less to research procedural issues such as procedural default, exhaustion of state remedies, and types of evidence which are admissible and relief available.

most complex area of the law that I deal with.... It's difficult. It's changeable. And it's very hard to apply."

3. The need for factual investigation

Furthermore, a great deal of factual investigation is in most cases critical if an inmate is to have any chance of obtaining post-conviction relief. Most viable post-conviction claims are not strictly legal issues, but have to do with after-discovered evidence or other grounds for relief that require extensive factual investigation. Sometimes new evidence of innocence is found. See, e.g., McDowell v. Dixon, 858 F.2d 945 (4th Cir. 1988) (evidence discovered during post-conviction that eyewitness in North Carolina capital case had originally identified perpetrator as being white, while defendant was a black person). In other cases factors beyond the inmate's control, such as mental illness, or a childhood of extreme abuse or neglect, may explain or mitigate the crime. See, e.g., Curry v. Zant, 258 Ga. 527, 371

S.E.2d 647 (1988) (evidence of organic brain damage discovered by counsel in state post-conviction proceedings). Sometimes additional evidence of a defendant's positive qualities is found, making it less simple to reduce the defendant to someone who has no right to live.¹³ Other irregularities in the proceedings are also frequently uncovered. See, e.g., Amadeo v. Kemp, 108 S.Ct. 1771 (1988) (evidence at

¹³Without the assistance of counsel, it is extremely unlikely that Andrew Laverne Smith and Shelly Damon, two South Carolina death row inmates, would have obtained post-conviction relief in the state courts. In both cases expert and lay testimony regarding the individual inmates' adaptability to prison was gathered and presented. On the basis of this evidence the state post-conviction court granted found that these individual's death sentences were obtained in violation of Skipper v. South Carolina, 476 U.S. 1 (1986). It is fanciful to believe that the inmates themselves could have gathered or adequately presented this evidence in a way which would have resulted in the success achieved by counsel.

intentional racial discrimination in selection of the grand jury in Georgia capital case uncovered during collateral proceedings); Stockton v. Virginia, 852 F.2d 740 (4th Cir. 1988) (counsel discovered evidence during post-conviction proceedings in Virginia capital case that the jury at the petitioner's capital murder trial had been approached during deliberations and told they "ought to fry the son of a bitch"). An individual isolated in a cell without financial resources simply cannot do the necessary factual investigation.

Effective post-conviction litigation requires a complete reinvestigation of the case, with a focus on material not in the trial transcript. What evidence was not presented and why? What evidence was not investigated and why? The trial transcript provides clues, but those clues mark only the beginning of the post-conviction

litigator's task. Even with access to a prison law library, inmates have little or no access to outside sources, such as expert witnesses (Ballistic, forensic, medical, psychiatric), character witnesses, and prior counsel, that may be vital to their cases. Mello, Facing Death Alone, supra at 543-48. Inmates pursuing post-conviction relief also have difficulty pursuing claims of ineffective assistance of counsel. To establish an ineffectiveness claim an inmate must produce evidence of the "background, character and reputation of appointed trial counsel and of what [counsel] did and failed to do," id., evidence which confined death row inmates have no way of obtaining.¹⁴ See Armstrong v. Dugger, 833

¹⁴For example, in Hyman v. Aiken, 824 F.2d 1405 (1987), while granting relief on the basis of an unconstitutional malice instruction, the court of appeals discussed in detail the inadequate representation received by William Gibbs Hyman, a South Carolina death row inmate.

F.2d 1430 (11th Cir. 1987).

4. The State is represented by experienced counsel.

Another aspect of the unfairness in asking death row inmates to proceed pro se in state collateral proceedings is that the state is in all cases represented by competent and highly trained attorneys. The South Carolina Attorney General's office, for example, employs at least four attorneys who specialize in post-conviction proceedings. These attorneys are very knowledgeable regarding the substantive law

The factual basis of petitioner's inadequate representation was developed in state post-conviction proceedings. The evidence consisted of additional evidence that could have been presented at trial and opinions of prominent members of the bar regarding the quality of the representation Hyman received. If Hyman had been forced to represent himself in the post-conviction proceeding, he would not have been able to adequately develop a proper factual record.

and procedure relevant to capital post-conviction proceedings. The same is true in all other states that have the death penalty. Thus, under circumstances where the state is represented by competent and highly trained individuals, the person whom the state seeks to execute cannot be fairly asked to proceed without the assistance of counsel.

D. Recent judicial and legislative actions demonstrate the realization that even attorneys appointed to represent indigent death sentenced inmates need assistance from persons experienced in capital litigation to adequately represent these persons.

Due to the complexity of capital litigation, even competent attorneys find it necessary to seek expert assistance. See "You Don't Have to Be a Bleeding Heart," Mikva and Godbold, 14 Human Rights,

22, 24 (Winter 1987). This need has been realized by the judicial and legislative branches of both the federal and state governments. In this regard the Judicial Conference of the United States and the Congress have recognized the importance of the involvement of expert legal consulting services in federal habeas corpus proceedings involving death sentenced inmates. This realization was formalized in the Criminal Justice Act Guidelines, paragraph 3.16, which was recently added to the CJA Guidelines. This section provides:

3.16 Consulting Services in Capital Federal Habeas Corpus Cases. Where necessary for adequate representation, subsection (e) of the Criminal Justice Act authorizes the reasonable employment and compensation of public and private organizations (such as the Florida Capital C o l l a t e r a l Representative and the

California Appellate Project) which provide consulting services to appointed and pro bono lawyers in capital federal habeas corpus cases in such areas as records completion, exhaustion of state remedies, identification of issues, review of draft pleadings and briefs, etc.

In February 1987, the Conference of Chief Justices, which consists of the chief judicial officer of every state and territory and the District of Columbia, urged the judicial leadership in each state having the death penalty to take action to assure that death row inmates receive competent legal representation in post-conviction review. The Chief Justices resolved that each state's judicial leadership should quickly begin a planning process involving executive and legislative representatives, the organized bar, and

prosecutors and defense counsel experienced in death penalty litigation "to establish a regular process for appointing, providing expert guidance for, and fairly compensating competent counsel to prepare and pursue state post-conviction petitions for all state death row inmates wishing to pursue such remedies."¹⁵

Of special significance is the creation of a number of death penalty resource centers to provide expert legal consulting services to counsel of record in

¹⁵Resolution IX, "Representation of Death Row Inmates in Post-Conviction Proceedings, adopted at the 10th Midyear Meeting of the Conference of Chief Justices on February 5, 1987, in Gleneden Beach, Oregon (emphasis added). The Chief Justices also proposed that each state's judicial leadership enter into a dialogue with representatives of the federal courts "to assure continuity of representation of death row inmates in state and federal post-conviction proceedings and an equitable apportioning of the costs of such representation between the state and federal judicial systems." Id.

death penalty cases.¹⁶ Resource Centers have been created in thirteen states, including South Carolina.¹⁷ Without the support of the federal and state judges in these various states, the creation of the Resource Centers would have been impossible. Furthermore, most states, the Resource Centers receive both state and federal funds. The Resource Centers will assist appointed and volunteer counsel in the identification of available grounds for relief, preparation of pleadings, legal research and preparation for hearings. Thus, the Resource Centers are a recognition by state and federal judicial

¹⁶Summary Report of the United States Judicial Conference Committee to Implement the Criminal Justice Act, Agenda Item G-11, Criminal Justice Act, March 1987.

¹⁷These states are: Alabama, Arizona, California, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee and Texas.

and legislative bodies that even practicing attorneys need assistance from persons experienced in capital litigation in these complex and time consuming matters, and rebut any argument that death sentenced inmates are able to achieve meaningful access to the courts without the assistance of counsel.¹⁸

E. Volunteer counsel cannot be relied upon to provide indigent death sentenced inmates with meaningful access to the courts.

¹⁸Congress has also taken other important steps which underscore the need for counsel and the complexity of capital litigation. First, the Anti-Drug Abuse Act of 1988 contains provisions guaranteeing appointment of counsel for all state prisoners under sentence of death in federal habeas corpus proceedings. H.R. 5210, 100th Cong., 2d Sess., 134 Cong. Rec. H 11,110, H 11,173 (1988). Recent legislation also raised the hourly rates of compensation in such matters to \$75 an hour, with a \$750 maximum that is routinely waived. Compensation for expenses of counsel, such as investigation and expert witnesses was also increased. 18 U.S.C.A. 3006A(d) and (e) (1987).

Many states have relied--and continue to rely on attorneys willing to volunteer to represent pro bono indigent persons on death row. However, because of the increasing number of inmates under sentence of death entering the state post-conviction and federal habeas corpus stages of the appellate process, this system of utilizing volunteer counsel, who in many cases are not compensated at all, is no longer workable. See Wilson and Spangenberg, State Post-Conviction Representation of Defendants sentenced to death, Judicature (forthcoming February 1989) ("the pool of volunteer lawyers cannot expand rapidly enough to meet the growing need").¹⁹ It is

¹⁹In South Carolina, for example, even attorneys appointed by the court to represent death row inmates in state post-conviction are not compensated. See Cowden, South Carolina Indigent Defense Services on Post-Conviction Relief, Report prepared for the South Carolina Law Institute (September 1988).

becoming increasingly difficult to find persons willing to agree to spend hundred of hours and thousands of dollars to represent persons on death row. Thus the only viable means of providing persons on death row with meaningful access to the courts is by the appointment of counsel who will be fairly compensated for their time and expenses.

CONCLUSION

For the reasons set forth in this brief, amici respectfully submits that this Court should conclude that a death sentenced inmate cannot achieve meaningful access to the courts without the assistance of counsel and, therefore, requests that the judgment of the United States Court of Appeals for the Fourth Circuit be affirmed.

Respectfully submitted,

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